In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1545

EARL L. BUTZ, SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

GLOVER LIVESTOCK COMMISSION COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX TO APPENDIX

Relevant Docket Entries

In Proceedings Before the Secretary of Agriculture

P & S Docket No. 4156

Date	Proceedings
1969	
May 12	Complaint filed
June 20	Answer of Respondent filed
1970	
January 28-29	Hearing held
August 17	Hearing Examiner's Recommended Decision filed
1971	
February 5	Decision and Order of the Judicial Officer filed
February 18	Stay Order Pending
	Outcome of Court Appeal filed

No. 71-1092 in the United States Court of Appeals for the Eighth Circuit

1971	
February 22	Petition for Review filed
1972	
January 26	Opinion and judgment filed

No. 71-1545 in the United States Supreme Court

1972	
April 18	Order Extending time for filing a petition for a writ of certiorari to and including May 25, 1972
May 25	Petition for a writ of certiorari filed
June 13	Order Extending the time for filing the Brief for the Respondents in Opposition
July 27	Brief for the Respondents in Opposition filed
October 24	Order granting petition for a writ of certiorari

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

GLOVER LIVESTOCK COMMISSION COMPANY, INC., RESPONDENT	P. & S. Docket No. 4156

COMPLAINT

[Filed May 12, 1969]

There is reason to believe that the respondent named herein has wilfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 *et seq.*), hereinafter referred to as the Act, and the regulations promulgated thereunder by the Secretary of Agriculture (9 CFR 201.1 *et seq.*), hereinafter referred to as the regulations, and, therefore, this Complaint is issued alleging the following:

I

(a) Glover Livestock Commission Company, Inc., hereinafter referred to as the respondent, is a corporation with its principal place of business located at Pine Bluff, Arkansas 71601.

(b) Respondent is, and at all times material herein was:

(1) Engaged in the business of conducting and operating the Glover Livestock Commission Company, Inc., stockyard, Pine Bluff, Arkansas, a posted stockyard under the Act, hereinafter referred to as the stockyard;

(2) Engaged in the business of selling livestock on a commission basis at the stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce.

II

(a) On or about June 2, 1964, and July 26, 1966, representatives of Complainant conducted an investigation of respondent's operations under the Act, and, in connection therewith, reweighed several drafts of consigned livestock that respondent, through its weighmaster employee, had

weighed for sale on a weight basis at the stockyard. Such reweighing disclosed that respondent, through its weighmaster employee, had weighed said drafts of consigned livestock at less than their true and correct weights. Accordingly, respondent was notified of the results of the checkweighing by a letter dated August 4, 1966, and was requested to institute corrective action which would assure accurate weighing at the stockyard in compliance with the Act and the regulations.

(b) On or about June 20, 1967, representatives of Complainant conducted another investigation of respondent's operations under the Act, and, in connection therewith, reweighed several drafts of consigned livestock that respondent, through its weighmaster employee, had weighed for sale on a weight basis at the stockyard. Such reweighing disclosed that respondent, through its weighmaster employee, had weighed said drafts of consigned livestock at less than their true and correct weights. Accordingly, respondent was notified of the results of the checkweighing by a certified letter dated June 26, 1967, and was requested to institute corrective action which would assure accurate weighing at the stockyard in compliance with the Act and the regulations.

(c) Notwithstanding the notices mentioned in subparagraph (a) and (b) above, respondent, on or about February 25, 1969, in the transactions referred to in the tabulation below, in connection with the weighing of consigned livestock sold by respondent on a weight basis at the stockyard, (1) weighed the livestock at less than their true and correct weights; (2) issued scale tickets and accountings to the consignors of the livestock on the basis of such false weights; and (3) paid the consignors for the livestock on the basis of such false weights.

No. of Head and Description	Name of Consignor	Sales Weight (Pounds)	Weight Shown Upon Reweighing (Pounds)	Weight Difference (Pounds)
1 Calf	E. E. Silliman	300	305	5
1 Calf	J. A. McFarlin	335	350	15
1 Calf	Bobby Whithead	255	265	10
1 Calf	O. Wolfe	370	380	10
1 Calf	E. Graves	380	390	10
1 Calf	Southwest Cattle Co.	365	370	5
1 Calf	M. N. Williams	365	370	5
1 Calf	Henry Williams	360	365	5
1 Calf	Southwest Cattle Co.	245	255	10

III

Respondent, in connection with the transactions specified in paragraph II above, kept accounts and records which failed to fully and correctly disclose all transactions involved in its business, in that respondent prepared, and made a part of respondent's accounts and records, scale tickets, accounts of sale, and buyers bills which failed to show the true and correct weights for the livestock specified in said paragraph II.

IV

By reason of the facts alleged in paragraph II herein, respondent has wilfully violated sections 307 and 312(a) of the Act (7 U.S.C. 208 and 213(a)) and sections 201.43(a), 201.55 and 201.71 of the regulations (9 CFR 201.43(a), 201.55 and 201.71).

By reason of the facts alleged in paragraph III herein, respondent has wilfully violated section 401 of the Act (7 U.S.C. 221), and section 201.49 of the regulations (9 CFR 201.49).

WHEREFORE, it is hereby ordered that for the purpose of determining whether the respondent has in fact violated the Act and the regulations thereunder, this Complaint shall be served upon the respondent. The respondent will have twenty (20) days after receipt of this Complaint in which to file with the Hearing Clerk, United States Department of Agriculture, Washington, D. C. 20250, an answer

with an original and three (3) copies, fully and completely stating the nature of the defense and admitting or denying each material allegation of this Complaint. Allegations not answered will be deemed admitted for the purpose of this proceeding. Failure to file an answer shall constitute an admission of all the material allegations of this Complaint.

The Packers and Stockyards Administration requests:

1. That unless the respondent fails to file an answer within the time allowed therefor, or files an answer admitting all the material allegations of the Complaint, this proceeding be set down for oral hearing in conformity with the rules of practice governing proceedings under the Act; and

2. That such order or orders be issued as are authorized by the Act and warranted in the premises.

Done at Washington, D. C.
May 12, 1969

/s/ Donald A. Campbell
DONALD A. CAMPBELL
Administrator, Packers and Stockyards Administration

RONALD M. GASWIRTH
Attorney for Complainant

[Title Omitted in Printing]

Designated Portions of the Transcript of the Hearing Held before the Hearing Examiner on January 28 and 29, 1970

[86] KENNETH GRIZZELL—CROSS

* * *

Q I understand. Are you saying these gentlemen cheated? [87] That's what I'm trying to find out.

A I feel like they weighed these livestock inaccurately.

Q Intentionally, with a desire and intent to favor the buyer? Are you saying that?

A From the records that were put in here I would think this. They were put on notice of——

MR. KRZYMINSKI: Mr. Examiner, I think this is a question for the Examiner to determine. I don't know whether the witness is qualified to testify as to the intent of anyone at the time of these check-weighings.

MR. ELLBOTT: He's qualified to say what he thinks. He's the supervising authority of this area.

MR. KRZYMINSKI: I think you're asking him to state the state of mind of someone else at the time of these weighings.

MR. ELLBOTT: I'm saying the state of mind of him.

HEARING EXAMINER BAIN: It's admissable on cross.

THE WITNESS: I don't think they weighed them correctly at the time of sale.

BY MR. ELLBOTT:

Q Do you think they intentionally did that?

A If they instructed their weighmaster to weigh this way, I'd say yes.

Q Do you have any proof they did that?

A No, sir, I don't.

[88] Q Not a bit, isn't that right?

A I don't have any proof they told the weigher to weigh this way.

* * *

BEN BAIRD—CROSS

[137] * * *

By MR. ELLBOTT:

Q Mr. Baird, you weren't at the sale at all that day or did you come in at the last of the sale?

[138] A On March 25th?

BEN BAIRD—CROSS

Q February 25th.
A No, sir.
Q You didn't come in until after the sale was over.
A That's correct, practically the time the sale was over.

[197] * * *
* * *

E. F. "BUCK" OLIGER—DIRECT

was called as a witness on behalf of the respondent, and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. ELLBOTT:

Q Your name is E. F. "Buck" Oliger?
A That's correct.
Q. Mr. Oliger, how long have you lived in Jefferson County, Arkansas?
A. Since 1929.
Q. For the record, Pine Bluff is a part of Jefferson [198] County and is the county seat; is that correct?
A. Yes, sir.
Q. Mr. Oliger, how long have you known the Glover boys? There are four of them sitting here. James isn't here.
A. Well, I imagine I'm older than any of the boys, so I would say all their life. I knew their daddy.
Q. If they are still classified as boys, Mr. Oliger, you are older than they are.
Mr. Oliger, you hold a position in Jefferson County, do you not?
A. Yes, sir.
Q. What is your position?
A. I'm sheriff of Jefferson County.
Q. And the collector of its taxes?
A. That's correct.
Q. How long have you been sheriff?
A. This is going on my fourth year.
Q. Mr. Oliger, before you were sheriff, what positions have you held in this county?
A. I was with the city police department and spent about eighteen years—seventeen years in the sheriff's office prior to being elected.
Q. You were the deputy sheriff?

A. Yes, sir.

Q. You say you have known these boys since 1929?

[199] A. Yes. I knew their father and then them.

Q. Mr. Oliger, do you know these young men, all of them, and their reputation in this community for truthfulness and honesty?

A. Yes, sir.

Q. Would you say it is good or bad?

A. Good.

MR. EILBOTT: That's all I desire to ask.

MR. KRZYMINSKI: No cross examination.

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JUANITA LEE—DIRECT

was called as a witness on behalf of the respondent, and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. EILBOTT:

Q. Your name is Juanita Lee?

[200] A. Right.

Q. Your name before marriage, however, was Juanita Glover; is that right?

A. Yes, sir.

Q. And you are a sister to James and Roy and Donnie and Thomas and Ed?

A. Yes, sir.

Q. Is that correct?

A. Right.

Q. For the record, James and Roy and Donnie and Thomas are the owners of Glover Livestock; is that correct?

A. That's correct.

Q. Ed doesn't have any interest in Glover Livestock Commission Company, Inc., the defendant herein?

A. Right.

Q. But the others are the owners and stockholders of it?

A. Right.

Q. Do you own any stock in the corporation?

A. No, sir.

Q. What job do you have, if any, out there?

A. I keep the records.

Q. You are the bookkeeper of the corporation?

A. Right.

Q. And how long have you been so employed? You are a [201] paid employee?

A. Right, since July of 1956.

Q. Since July of 1956.

A. Right.

Q. Juanita, during that time you have seen Exhibit 6, these weight reports, come through your office; is that correct?

A. Yes, sir.

Q. Are they a part of the records that are kept by your office?

A. Yes, sir.

Q. And you have seen the weight approval as shown—I mean the scale approvals as shown by Exhibit 6 come through the office regularly and be filed; is that correct?

A. Right.

Q. Juanita, would you tell me please when Glover Livestock Commission was organized? Do you know?

A. Daddy started it in 1936.

Q. For the record, what was your father's name?

A. James Elbert Glover.

Q. And he started it in 1936——

A. Right.

Q. ——as a privately owned concern?

A. Right, Glover Commission Company.

Q. That's all that was in it, right?

A. Right.

[202] Q When did he take in some of the boys?

A I think it was '45 or '46. I won't say for sure because they had just come back out of the army.

Q Who had come back?

A Roy and James. Roy is the oldest.

Q So that the record will reflect and in order that Mr. Bain will know, we have these men here that Buck Oliger called boys. Do you know how old Roy Glover is? He is president of Glover Livestock.

A Roy is 45.

Q James is the next one, is he not?

A James is 43.

Q James is the one that is sick, right?

A Right.

Q And the next one, then, is you?

A Right.

Q I won't ask you your age. The next one after that is Thomas?

A Ed.

Q How old is Ed?

A Ed is forty.

Q And Thomas is the next one.

A Thomas is 33.

Q And Donnie, of course, is the baby of the family. How old is he?

[203] A He's 31.

Q Now after the war your father took in first Roy and James?

A Right.

Q And later on——

A Of course, they grew up with working in it. They were working with dad.

Q Before they went to war?

A Right. Of course, they became partners after they came back from the army.

Q And gradually it has expanded to include all of the boys except Ed.

A Right.

Q Now Ed runs his own trucking; is that correct?

A Right.

Q And as such, he hauls cattle from the yard; is that correct?

A Right.

Q In addition to that, all of the Glover boys, plus Ed—including Ed—operate through Southwest Cattle Buying Association; is that correct?

A Right.

Q What is the correct name of that?

A Southwest Cattle Company.

Q That is an order taking and selling partnership—[204] it's not a partnership, but is actually owned by James?

A Right.

Q Not attempting to go into great detail with you on the matter, but Southwest buys and sells cattle; is that correct?

A Correct.

Q Some of which are bought and sold through the auction; is that correct?

A Right.

Q Do you know what the boys get for buying or selling cattle through Southwest?

A We get 25 cents a hundred. The office keeps a nickel and the buyer gets twenty cents.

Q A nickel goes to James. That is the office, and James owns the office; is that correct?

A Yes.

Q Now, can you tell me this: how many employees do you all have out there?

A In Glover Livestock Commission Company?

Q Yes, ma'am.

A I had 97 W-2 forms.

Q For last year?

A Right.

Q Of those 97 part of them are part-time workers, aren't they?

A Right.

[205] Q You have some turnover; is that not correct?

A Very much in the colored help on sale day.

Q In other words, on Tuesdays you have to have extra help.

A Right.

Q Do you have any idea how many you put on for Tuesdays?

A There will be fourteen or fifteen behind the scales.

Q And consequently those fourteen or fifteen turn over some.

A One day a week it's hard to keep someone.

Q So that's the reason for the 97.

A Right.

Q For the benefit of the Hearing Examiner, could you tell me what the gross sales, approximately, of Glover Livestock were last year through the auction.

A Through the auction—I didn't get the exact amount—it will be around $5 million.

Q Can you tell me, please, what the gross—I presume it would be sales and purchases—through Southwest Cattle Company was?

A It was pretty close to the same figure.

Q Was it a little more or a little less?

A I believe it was a little less.

Q I had understood it was a little more.

A In which one?

[206] Q Southwest Cattle Company.

A Southwest is a little more than Glover Livestock Commission Company.

Q Do you have any idea how many cattle were bought and sold by Southwest last year?

A No, sir, I don't. I can get that, but I don't remember.

Q Would 65,000 sound about right?

A Approximately.

Q That's the figure you gave me the other day.

Now in order to give Mr. Bain an idea of the size of the sales, you all had a sale last Tuesday; is that correct?

A Correct.

Q You have an auction every Tuesday through Glover Livestock; is that right? Glover Livestock is the defendant herein.

A Right.

Q Last Tuesday you had a sale; is that right?

A Right.

Q It was a large sale, was it not?

A It was.

Q I believe you told me that—I'm leading.

MR. ELLBOTT: Mr. Krzyminski, any time you want me to stop you tell me. I'm trying to put these facts in the record.

MR. KRZYMINSKI: I see.

[207] By MR. ELLBOTT:

Q Juanita, you had not had a sale since when?

A Well, we had a small sale, of course, the week before, but the weather was bad and it was a very small one. Sixty head is what I think it was.

Q We have had unusual snow and ice here in the last month; is that correct?

A Right.

Q It's something we don't know much about. The farmers don't get in.

A Right.

Q Therefore, Tuesday was an unusually large sale?

A Yes, sir.

Q How many cattle were run through the auction Tuesday?

A Seven-sixty, I believe or around that figure. I don't have it exact.

Q Around 760 cattle?

A Close to 800.

Q Now I want to ask you one other question, if I may. Juanita, I hand you herewith Exhibit 4-A of the Government. This is the schedule of reweighing that the Government made, according to the record, on February 25, 1969. You are the receiver and paymaster; is that correct?

A Correct.

Q What is owed by the buyers you receive——

[208] A Yes.

Q ——and what is owed to the seller of the cattle you pay out; is that correct?

A Correct.

Q You are the paymaster.

A Right.

Q Now in this reweighing which is shown in Exhibit 4-A, there is shown a first group of cattle that went to S. V. Hunt. For the record, can you tell me who S. V. Hunt is?

A S. V. Hunt is an order buyer that lives at Heber Springs, Arkansas. He buys for Swift and Company. These calves he sent to St. Louis.

Q To Swift and Company?

A Right.

Q Now the next lot of cattle are shown as having been sold to Southwest Cattle Company; is that correct?

A Correct.

Q And by the side of that it has the word "Tom"; is that correct?

A Right.

Q Now Southwest Cattle Company is your order buying company——

A Correct.

Q ——and order selling company.

A Right.

[209] Q And it is owed by James as you described awhile ago?

A Correct.

Q They buy for individuals; is that correct?

A Correct.

Q And they also buy for firms and corporations?

A Right.

Q Now, can you tell me when Southwest Cattle Company was the purchaser of those cattle, which are shown on Exhibit 4-A with the word Tom by the side of it, who those cattle were bought for? Who is Tom? Is it Thomas Glover?

A No, sir, it's Tom Triplett.

Q And who is Tom Triplett?

A He's a man that called in for cattle that lives at Amarillo, Texas.

Q And do you all ship those cattle to him?

A We do.

Q After the sale?

A Yes, sir.

Q That is Tom Triplett from Amarillo; is that correct?

A Correct.

Q And he sends you the check. Is that the idea?

A Yes, sir.

Q Now the next group of cattle that are shown there is also shown as Southwest Cattle Company and the mark number is 106, and outside of it I asked Mr. Grizzell or Mr. Baird [210] yesterday on the witness stand from the actual weigh tickets to show these numbers, and they have been placed in there. Southwest Cattle Company number 33. Is that an order for an individual or firm?

A Yes, sir.

Q Who is that an order for?

A Van Roach Cattle Company at Ft. Worth, Texas.

Q In other words, when this Exhibit 4-A on this reweighing shows that Southwest Cattle Company sold a cow, through the auction, to Southwest Cattle Company number 33, that meant that someone who was a member of Southwest had sold this cow to Van Roach; is that correct?

A Correct.

Q Who was the owner of Southwest Cattle Company calf number 106? Did you look it up for me?

A Yes, sir. That was Thomas.

Q Thomas Glover?

A Right?

Q He owned a calf——

A Right.

Q ——that was run through the auction.

A Right.

Q And it was sold to Van Roach?

A Yes, sir.

Q And they are in Ft. Worth; is that correct?

[211] A Yes.

Q And it was to be shipped to him?

A Right.

Q And on that reweighing Thomas Glover, according to the Government's figures, lost ten pounds. That is, the cow was sold for 245 pounds when in truth and fact it weighed 255 pounds.

A Correct.

Q So if anybody got cheated out of any money Thomas Glover got cheated; is that correct?

A Right.

Q Now the next Southwest Cattle Company right below that is cow number 400. Who is Southwest Cattle Company number 45?

A That's also Van Roach.

Q That's another number assigned to Van Roach?

A Right.

Q What is the reason that he has more than one number?

A When they call in—at this time they were buying as high as fifteen or twenty different classes of cattle for Van Roach Cattle Company. This way they have certain numbers for steers and their weight and heifers. This 31X is a heifer, and the rest are steers and their weight.

Q Now the next item here is cow number 177 and it's number 30.

[212] A Yes.

Q Southwest Cattle Company number 30. Who is Southwest Cattle Company number 30?

A That's also a calf for Van Roach.

Q Can you tell me who calf number 179, 31X, is?

A Still Van Roach.

Q And it's a heifer?

A Right.

Q The next one is item number 430. That is Southwest Cattle Company number 37. Who is that?

A That's Van Roach.

Q And the next one 199 is the mark, and its Southwest Cattle Company number 30. Who is Southwest Cattle Company number 30?

A That's also Van Roach.

Q Does one of the boys buy everything for Van Roach,

or was it possible that more than one of them would have been buying?

A Ed was the buyer on these cattle.

Q On all of those cattle that are shown as having been bought—that's 106, 400, 177, 179, 430, 252, and 199; is that correct?

A Right.

Q Over on the next page let's see if we have any more? The next group of cattle begin with mark 208, 326, 325, 322, [213] and 319. Do you see this on page two of this Exhibit 4-A of the Government?

A Yes, sir.

Q That has Southwest Cattle Company as the purchaser and by the side of it it's got "Armour"; is that correct?

A Yes.

Q Who is Armour?

A Armour and Company of Memphis is a packing company that we buy for.

Q One of the boys bought through the auction sale in the name of Southwest Cattle Company, the order buying company, a group of cattle for Armour and Company——

A Correct.

Q ——to be shipped to them?

A Correct.

Q Do you know which one of the boys handled the purchase for Armour and Company?

A It will be either Ed or James.

Q They both buy for Armour and Company; is that correct?

A Right.

Q And that is the situation on this Exhibit 4-A; is that correct?

A Yes, sir.

Q Well, I'll go back up to the same thing. I want [214] to point out on mark 117 that Southwest Cattle Company is shown as the seller. Did you look up for me to see who actually owned that cow or calf?

A No, I didn't, but it will be on the ticket and I can tell from that.

Q I'll get it for you.

A On number 117—it looks like all of these are Tom.

Q In order to keep on the records, that's an overweight. I'm sure they have that on their exhibit.

A I think we have all this down as Tom.

Q The Government has introduced as its exhibit, Exhibit 4-C, which are the weight tickets for those cattle which are shown to have been sold for less weight than the cow actually weighed on reweighing.

Item number 117 is shown as an owner, Tom. No, that's sold to Tom. How can you tell who owned the cow?

A Here is the owner here. (Indicating.)

Q That's Southwest Cattle Company. What I'm trying to find out is do you know which one of the boys owned it.

A Thomas.

Q Thomas Glover owned calf number 117; is that correct?

A Right.

Q. And he sold that cow in auction; is that correct?

A Correct.

Q He sold it to Southwest Cattle Company for Tom; is [215] that correct?

A Correct.

Q And that was Thomas Triplett?

A Right.

Q So on that sale, according to the Government's weighing, Thomas Glover lost five pounds that he should have been paid for; is that right?

A Right.

Q They weighed the cow at the sale and it was 365 pounds, and when the Government reweighed it, it was 370 pounds; is that correct?

A That is.

Q So Thomas, according to that, lost five pounds on the calf he sold; is that correct?

A That's correct.

MR. ELLBOTT: You may examine. That's as far as I want to go with this witness.

JUANITA LEE—CROSS EXAMINATION

By MR. KRZYMINSKI:

Q Mrs. Lee, when these cattle are billed out to Armour or Tom or anyone else for whom Southwest Cattle Company buys on order, what does Southwest Cattle Company receive in payment from the recipient of the livestock?

A You mean when we ship these cattle?

[Title Omitted in Printing]

ANSWER

[Filed June 20, 1969]

Comes the respondent and as and for his answer to the complaint filed herein and states:

1. Respondent admits the allegations of Paragraph I of the complaint.

2. Respondent denies each and every material allegation of Paragraph II of the complaint and specifically denies that the alleged reweighing conducted by the complainant resulted in a finding that the livestock checked by the complainant's agent weighed more than reflected on the respondent's records.

3. Respondent would specifically state that the records of the complainant revealed that on those occasions tests were conducted, certain of the livestock reweighed were revealed to be of less weight than indicated on the respondent's weight tickets. Further, that the complainant's own records reveal that in addition to the livestock referred to on page 3 of the complaint, of which there are 9 in number, 19 other cattle were weighed by the complainant's representatives and as a result of said reweighing, 10 of the cattle were found to have the same weight as indicated by the respondent's records and 9 were found to weigh less than indicated by the respondent's records.

4. That some of the livestock referred to on page 3 of the complaint were sold by the Southwest Cattle Company, which is an allied corporation of the respondent, and according to the complainant's records these livestock were sold at weights less than the alleged tests conducted by the complainant's representatives indicated.

5. That all tests allegedly conducted by the complainant's representatives were of cattle taken from various pens in the stockyard after the sale and weighing by the respondent, some of which pens had feed and water which would cause the cattle to gain in weight and some of which pens had neither. That the partaking of feed and water after weighing by the respondent's weighmaster would have resulted in a material variance in the weight of the livestock in issue.

6. That the scales used by the respondent are periodi-

cally checked by an individual designated by the complainant who holds himself out to be an expert in this field and at the conclusion of each test, authorized and directed by the complainant, the scales in issue were approved.

7. Respondent denies each and every allegation of Paragraph III of the Complaint.

8. Respondent denies each and every allegation of Paragraph IV of the complaint.

9. Respondent requests an oral hearing on all issues involved herein.

WHEREFORE, respondent prays that the complaint of the complainant be dismissed and that the complainant be granted none of the orders or other procedures set out in the complaint.

REINBERGER, EILBOTT, SMITH & STATEN
P. O. Box 5010
PINE BLUFF, ARKANSAS
ATTORNEYS FOR RESPONDENT
By R. A. Eilbott, Jr.
[R. A. EILBOTT, JR.]

[Verification and certificate of service omitted in printing]

Q Is there any particular reason why Southwest is shown rather than Tom Glover?

A Yes. They all clear through that company.

Q But you are stating that each takes individual ownership; is that correct?

A Yes. If anything—well, say they have a calf that maybe they got too much for a load—they couldn't get it on—then they sell those cattle. Carryovers and things like that are checked into the ones that buy them.

Q And they sell them as cattle belonging to Southwest Cattle Company——

A Right.

Q ——rather than as cattle belonging to each individual.

A Well, I run it through Southwest Cattle Company.

MR. KRZYMINSKI: I have no further questions.

[JUANITA LEE] REDIRECT EXAMINATION

By MR. ELLBOTT:

Q Let's carry Mr. Krzyminski's calculations just a little bit further, if we may. In the first place, I want to ask you if you keep some type of record out there at the office which shows, for instance, that Thomas Glover was, in fact, prior to the auction the owner of these two cows or calves, [220] 117 and 106.

A Yes, sir.

Q You have a sheet or ledger that shows——

A Showing where Thomas bought those calves.

Q And they are entered up as a credit to Thomas'——

A Account.

Q ——account on Southwest Cattle Company's total ledger; is that correct?

A That's correct.

Q Mr. Krzyminski started out with some mathematical calculations, but we didn't go far enough to suit me. It may have been for his purpose, but not for mine.

Now with that Exhibit 4-A in front of you, what—what was the other exhibit you used?

MR. KRZYMINSKI: Exhibit 4-E.

By MR. ELLBOTT:

Q Mrs. Lee, you said that 117, I believe it was, sold at thirty-two and a half cents.

A Correct.

Q The Government showed that the overweigh was five pounds; is that right?

A Correct.

Q Therefore, multiplying thirty-two and a half cents by five pounds that would be that Thomas Glover received $1.62 and a half cents less for that calf than he would have received had the auction sale shown the same weight as the [221] Government showed?

A That's correct.

Q Since there was on the other calf, 106, twenty-nine and a half cents a pound and the Government's record shows that Thomas Glover received ten pounds too little; is that correct?

A Correct.

Q Therefore, according to the Government's records, Thomas Glover received $2.95 less for that cow than he would have received had the Government's weight been accepted, rather than the auction sale weight; is that correct?

A That is correct.

Q Now who bought for Tom Triplett, the buyer of animal number 117?

A Don.

Q And Donnie got for Tom Triplett's sale 25 cents a hundred weight.

A Correct.

Q Twenty-five cents a hundred weight, that's a quarter of a cent per pound.

A Right.

Q So Donnie, in the case of cow 117, got one and one fourth cents more for that cow than he would have gotten as commission if the auction sale had been the correct weight instead of the Government's weight; is that correct?

[222] A Correct.

Q So it cost Thomas Glover, his brother, $1.62 and a half cents to produce one and one fourth cents for Donnie, is that correct?

A Correct.

Q And Donnie had to give James one-fifth of that because he gets a nickel out of every 25 cents for his overhead and bookkeeping; is that correct?

A Correct.

Q And James is not a member of Glover Livestock; is that correct?

A Did you say James?

Q Yes.

A It's Ed.

Q That's right. James is a member, but he is also the owner of Southwest.

A Right.

Q Let's carry cow number 106. Who bought for Southwest Cattle Company number 33?

A Ed.

Q He's not a member of the corporation, right?

A Right.

Q Ed bought for Van Roach, number 33. According to the calculations it cost Donnie—I mean Thomas $2.95 because the Government said that calf weighed ten pounds more than he [223] received for it; is that correct?

A Correct.

Q That's ten times twenty-nine and a half cents. For him to be shorted $2.95, Ed down there got ten one-fourth cents as commission, or in other words, he got two and a half cents more for that calf because it actually weighed ten pounds more than Thomas got for it.

A Correct.

Q Except for the fact, of course, that you all still billed, I presume, Van Roach and Tom Triplett on the basis of your auction sale, and not what the Government reweighed; is that right?

A That's right.

Q If we figured it out, it would amount to two and a half cents commission on one for a loss of $2.95 to his brother. The other one would amount to $1.62 cent loss for Thomas in order that his brother would have gotten one and one fourth cents.

But the truth about the matter is that you all billed on the basis of your auction sale figure or weight, so actually the only person that really lost, as far as those two sales was concerned, was Thomas lost $1.62 and a half cents on one and $2.95 on the other; is that correct?

A Correct.

Q And the brothers didn't get paid a dime more as [224] commission for having that extra five and ten pounds; is that correct?

A That's correct.

MR. EILBOTT: That's all.

[JUANITA LEE] RECROSS EXAMINATION
By MR. KRZYMINSKI:

Q Mrs. Lee, do you know at what price per hundred weight Thomas Glover originally purchased animal number 106?

A No, I don't.

Q And do you know at what price per hundred weight he originally purchased animal 117?

A No. I could check and see if both of those were bought on orders. Sometimes he buys just to trade.

MR. KRZYMINSKI: I have nothing further.

(Witness excused.)

* * *

HENRY B. SMITH—DIRECT
was called as a witness on behalf of the respondent, and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION
By MR. EILBOTT:

Q Your name is Henry B. Smith?

[225] A Right.

Q You are the Circuit Judge in and for the Eleventh Judicial District or is it the Twelfth?

A Eleventh.

Q It's the Eleventh Judicial District of Arkansas?

A Yes.

Q As such you are the Circuit Judge for Jefferson County, Lincoln County and Desha County; is that correct?

A Correct.

Q And in our system of jurisprudence the Circuit Judge is the trier with a jury; is that correct?

A Correct.

Q In other words, you conduct all jury trial in that circuit?

A Right.

Q Chancery court can have a jury trial, but it's merely advisory and they handle equity matters as opposed to law.

A Correct.

Q How long have you been Circuit Judge in the Eleventh Judicial District in Arkansas?

A I'm serving in my twentieth year now.

Q Before you were Circuit Judge, were you a prosecutor in the same district?

A Yes, sir.

[226] Q You were the District Attorney as some folks call it. We call it the prosecuting attorney.

A Yes, sir.

Q How long were you Prosecuting Attorney for this district?

A Fourteen years.

Q And before that, Judge Smith, you were in the House of Representatives of the State of Arkansas; is that correct?

A Yes.

Q For how long, sir?

A I served one term for Lincoln and one term for Jefferson.

Q Judge Smith, how long have you known Roy, Donnie, Thomas, Ed and the other one is James who is not here today? How long have you known them?

A I would say practically ever since they were little kids. I used to sell their father cattle back before they knew anything.

Q Judge Smith, you are, in addition to being our Circuit Judge, a farmer with your son; is that not correct?

A That's correct.

Q And you all have your own cattle?

A Yes, sir.

Q And do you buy or ever sell at the Glover auction?

A I sell; I don't buy.

[227] Q Judge, how often do you go to the auction?

A I go more often than I have cattle because I got out and watch the market frequently, and watch the sale.

Q And meet with the folks out there. You enjoy it.

A Yes, sir.

Q Judge, do you know these boys' reputation in this community and this area for truthfulness and honesty?

A I do.

Q Judge, would you say it was good or bad?

A It is good.

Q Judge, have you been out at these sales when the sale has been stopped for some reason?

A Yes, sir.

Q Does that happen quite frequently?

A It does.

Q Do you know why?

A I never asked or never heard anybody say.

Q But you have been there when they stopped the sale periodically for a short time; is that correct?

A That's correct.

MR. EILBOTT: You may examine.

MR. KRZYMINSKI: No questions.

* * *

[237]

[ROY GLOVER—DIRECT]

Q Now these auctions are held by Glover Livestock Commission Company, Inc.; is that correct?

[238] A That's correct.

Q At these auctions does the seller have the right to refuse to sell?

A Yes, sir.

Q In other words, in plain language, if I give you my cow to sell and you run him through that pen out there or that circle—what do you call it?

A Auction ring.

Q If he is run through that ring and he brings 31 cents a pound as the highest bid, and I'm the owner, I don't have to take that 31 cents a pound.

A No, sir.

Q I can refuse it?

A Right.

Q What do I do if I refuse it?

A You take him back home.

Q How do I say I refuse it?

A P.O.

Q What does that mean?

A Pass-out.

Q Carrying this a little further, you put that cow—you don't do it; actually Thomas or James runs the ring, don't they?

A That's right.

Q But you've got the cow going around and the best [239] bid you got is 31 cents, and I, as the owner, say I don't want to sell it for that price.

A Right.

Q How much did it cost me to have you try to sell it?

A Not a dime; not nothing.

Q Not nothing?

A Right.

Q A pass-out doesn't cost a dime, except on horses and mules?

A That's right.

Q Now there are times when whoever is running that ring starts an animal off at a particular price; is that right?

A Correct.

Q The reason for that is that you try to support your own market; is that correct?

A We do.

Q In other words, Glover Livestock, like anyplace else, they try to keep their business.

A Right.

Q You don't go out and guarantee to a farmer you will get X number of cents, but you say that it ought to bring about so and so; is that correct?

A That is correct.

Q And then the man that is running that auction may start that calf off or that cow off at 31 cents a pound; is [240] that correct?

A That's correct.

Q And if there are no takers then, who buys it?

A Glover Livestock Commission Company.

Q That is your company that buys it. You are hooked with it.

A That's right.

Q If nobody biding around that ring sales, "I'll buy it for that price" or more, you have to buy it.

A That's correct.

Q Then you have to peddle them the best way you know how.

A Right.

Q And that way a little weight difference might make a little difference to you.

A It could.

Q Do you have the loss figures for the years the Glover Livestock has conducted that?

A I have them at the office, but I can kind of recite them from memory. I can come close to it.

Q Well, I will ask you in order to save time. Is it true that in 1965 by such an operation Glover Livestock lost $3,041.38?

A That's correct.

Q In 1966 you lost $3,148.40.

[241] A That's correct.

Q In 1967 you lost $3,211.64.

A Correct.

Q In 1968 you lost $3,615.51.

A Yes, sir.

Q In 1969 you lost $5,04.19. [sic]

A Correct.

MR. KRZYMINSKI: May I ask counsel you intend to put these figures in by some documentation?

MR. EILBOTT: I will if you want me to get them. I just copies them down. I thought he would testify and have them with him, but he doesn't have them. I can get Mrs. Lee to get them for me.

MR. KRZYMINSKI: I thought someone stated that Ed had them.

MR. EILBOTT: That's my law partner.

MR. KRZYMINSKI: Are you intending to put them in through this witness?

MR. EILBOTT: Yes.

MR. KRZYMINSKI: I don't think we have any objection.

By MR. EILBOTT:

Q Consequently, if there was any underweighing of cattle that Glover Livestock purchased itself, you certainly didn't make a profit doing it when you sold them; is that correct?

[242] A That's correct.

MR. EILBOTT: Mr. Krzyminski, I'll do whatever you'd like on that. The figures came from the office.

MR. KRZYMINSKI: We are satisfied with the testimony.

• • •

[249] . . .

KNOX NELSON—DIRECT

was called as a witness on behalf of the respondent, and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. EILBOTT:

Q. Mr. Nelson, your name is Knox Nelson?

A. That's correct, yes.

A. And you are the owner and operator of the Mobil distributor ship here in Pine Bluff?

A. Yes, sir.

Q. Well, for Jefferson County.

A. Yes, sir.

Q. In addition to that you are the secretary of the Associated General Contractors of the State of Arkansas with an office in Little Rock; is that correct?

A. Yes, sir.

Q. In addition to that you are the state senator from Jefferson and Lincoln counties of which Pine Bluff is a part; is that correct?

A. That's true, yes.

Q. How long have you been senator?

A. I've been senator twelve years and a member of the

[250] House for four years.

Q. When you speak of the House, you mean the House of Representatives of the State of Arkansas?

A. Yes, sir.

Q. Therefore, you have held public office for a minimum of sixteen years; is that correct?

A. Yes, sir.

Q. Mr. Nelson, how long have you known the Glover boys?

A. All my life.

Q. How old are you?

A. I'm 43.

Q. You were born and raised in Lincoln County?

A. On the Lincoln and Jefferson County line at Moscow.

Q. I won't mention the name of the town out of deference to you.

Mr. Nelson, do you quite frequently go to the cattle sale out here?

A. I do.

Q. You happen to be one of the auction bugs; is that correct?

A. Yes, sir, and I farm too. I have a cattle farm.

Q. How many acres do you farm?

A. Around 500 in all.

Q. Around 500 acres?

A. Yes, sir.

[251] Q. And do you buy and sell cattle or what do you do out there?

A. I sell and buy cattle through the Glover boys, and in fact, I have a order placed now for some cattle with them.

Q. To buy?

A. Yes, sir.

Q. Mr. Nelson, in your frequent association out at the cattle auction, have you ever noticed them stop a sale?

A. Yes, sir, I've been there when they had to stop a sale.

Q. Have they ever told you why it was being stopped?

A. They had to move some cattle around on account of the crowded conditions.

Q. Mr. Nelson, are you familiar with the reputation of the Glover boys in this community and this area for truthfulness and honesty?

A. Yes, sir, very much so.

Q. Would you say it was a good or a bad reputation?

A. Very good. Very good.

MR. EILBOTT: Your examination, please.

CROSS EXAMINATION

By MR. KRZYMINSKI:

Q. Sir, were you at the auction sale on February 25, 1969?

A. No, sir.

[252] MR. KRZYMINSKI: No further questions.

MR. EILBOTT: You may or may not; is that correct? I'm willing to take the no, but he may have been.

THE WITNESS: I don't keep up with the dates I attend the auction. Sometimes I can only go down there and spend two hours and perhaps the whole auction.

If I may, I have known these gentlemen and I know them to be good businessmen. I know them for honesty in business; I know them socially. I have bought cattle through their auction and I've sold cattle through their auction. I

consider them outstanding community leaders and businessmen. I don't believe they would knowingly do anything wrong.

MR. KRZYMINSKI: I'd like to ask one more question.

RECROSS EXAMINATION

By MR. KRZYMINSKI:

Q. Sir, do I understand you to be saying that you are in no position to testify as to whether the sale of February 25, 1969, was stopped for the purpose of moving cattle?

MR. EILBOTT: Mr. Bain, I'd be willing to stipulate that he's in no position to testify, because he doesn't remember that date. I asked him and his answer is that he doesn't remember whether he was there or not.

MR. KRZYMINSKI: No further questions.

HEARING EXAMINER BAIN: You are excused.

(Witness excused.)

[351] • • •

[KENNETH GRIZZELL]—FURTHER RECROSS EXAMINATION

By MR. EILBOTT:

Q. Mr. Grizzell, as long as you are on the stand, I want to ask you whether or not P and S instructions say that on a split you go down?

A. It is not, sir.

Q. Was there a Mr. Matheson of your office or a part of your office?

[352] A. A Fred Madison was——

MR. KRZYMINSKI: I think counsel here is going behind the scope of redirect.

HEARING EXAMINER BAIN: I think I will allow that question. It came up before. You may be technically right on the objection, but I'll overrule it.

THE WITNESS: I am not aware what Mr. Madison would have told them, but it's always been in the trade from years back that they always felt it right that they gave the so-called break of the beam to the buyer. In other words, they would never on that two and a half split go up to the next two and a half. They always went back.

It was in the trade to my knowledge since I've been with

Packers and Stockyards since 1951. We have never proposed that you go back. We say you should be fair. One time you go down; one time you go up. They even out in the trade.

By Mr. Eilbott:

Q. Mr. Grizzell, these gentlemen were raised in this trade and they were taught by their father, and they've come up in the trade. What you are saying is that the trade has always gone down, bit [sic] it's your feeling it ought to be an evening up; is that correct?

A. That's correct.

Q. But the trade itself has always felt that you go down.

[353] A. That's right.

Q. Is that correct?

A. That's my understanding.

Q. And they have followed what was followed in the trade as a custom of the trade, evidently, for quite a while. You would agree with that?

A. Yes, sir.

• • •

Q Yes.

[216] A We either draw drafts or they send the money in by mail or by the trucks.

Q How was the amount shown on the check determined? In other words, how much do they pay you? How do they determine what they are to pay the Southwest Cattle Company?

A Say like a load of cows sent to Armour?——

Q Yes.

A ——through Southwest?

Q Yes.

A Well, on packers it's fifteen cents a hundred and a commission is added on and the trucking and if we feed them anything. They send in a check for the total amount.

Q So anything that is bought on order by Southwest Commission Company for Armour or any of these other people——

MR. ELLIOTT: Excuse me, on packers now. There is a different commission on the other.

By MR. KRZYMINSKI:

Q ——a commission is received; is that correct?

A Right.

Q And you stated that in the case of Armour it was fifteen cents per hundred weight?

A Right.

Q Is a commission received on purchases on orders for this Tom Triplett?

A Yes, sir.

[217] Q And do you know how much those commissions are?

A Twenty five cents.

Q And how much commission is received from Van Roach Cattle Company?

A Twenty five cents.

HEARING EXAMINER BAIN: How do you spell Roach?

THE WITNESS: R-o-a-c-h.

By MR. KRZYMINSKI:

Q Now you discussed, I believe, two particular head of livestock. One was designated as number 106, and the other was designated as number 117; is that correct?

A Correct.

Q If number 117 was sold at five pounds less than its actual weight, if you knew the price per pound at which it was sold, could you determine the amount of money that would be lost, based on that shortage of weight?

A Yes.

Q Could you determine it by making an examination of——

MR. EILBOTT: What do you want? The price of 117?

MR. KRZYMINSKI: Yes.

MR. EILBOTT: I have the original weight tickets here.

MR. KRZYMINSKI: I am interested in having her examine the purchase invoices which went along with the load.

By MR. KRZYMINSKI:

[218] Q Now I believe that number 117 is shown on page two of Complainant's Exhibit 4-E. Now if that particular animal, showing a price of thirty-two-fifty per hundred weight—is that right?

A Right.

Q ——were sold at five pounds less than its actual weight you would be able to determine the amount of loss based upon that price per hundred weight; is that correct?

A Yes. It would be thirty-two-fifty by the five pounds.

Q That would be thirty-two and a half cents a pound; is that correct?

A Correct.

Q And how much would it be on number 106? That's shown on page three of the same exhibit.

A It's twenty-nine-fifty.

Q And that would be interpreted as 29 and a half cents a pound; is that correct?

A Right.

Q I think I have one other question. If you will examine Complainant's Exhibit 4-A under the column "seller", and concerning yourself with the two animals we have been discussing, number 117 and number 106, you stated that these were both owned by Tom; is that correct?

A Right.

[219] Q Who is shown on these columns as the seller of those particular head?

A Southwest Cattle Company.

short weighed livestock it sold, as stated in Proposed Finding 4 above. After three investigations (Proposed Findings 2 and 3) had indicated that respondent was not weighing properly, it should not be surprising that a further check was made by complainant on respondent's weighing. This occurred on February 25, 1969, when two employees of complainant, assisted by employees of respondent, selected 28 drafts theretofore weighed by respondent for sale, and reweighed them. Of these drafts, 27 were one head each, the other being a cow and calf, giving a total of 29 head reweighed. Of the 28 drafts reweighed, no animal had access to feed or water between weighing for sale and check weighing, except for five head from one pen, which five each showed a *loss* on reweighing (Transcript, pages 17-18 [hereinafter "Tr. 17-18], 110, 123-126).

When livestock are weighed twice, with intervening time during which they have not had access to feed or water, they will usually show a loss in weight due to shrinkage, including urination and defecation (Tr. 31-36, 98-99, 124-125). It is concluded that the nine animals which showed an apparent gain in weight between the weighing for sale and the check weighing were falsely underweighed by respondent, as charged in the complaint and shown in Proposed Finding 4. The 19 animals showing no loss were at least considerably above the usual expectancy in such cases.

The evidence is that respondent's officials gave no reason for the apparent gains in weight between the two weighings when questioned at the time, but at the hearing claimed that the reweighed animals had been moved from pen to pen between the weighings and therefore could have had access to feed and water. This claim is rejected: it is unbelievable that, if the reweighed animals *had* had access to feed or water between the weighings, an experienced stockyard operator would have so stated when asked to explain the apparent weight gains. Although all of the persons connected with the ownership of the respondent corporation who attended the hearing appeared to be admirable individuals, it is reluctantly concluded that the claim of pen shifts between weighings is unsupported. It is further concluded that for its willful violations of the Act, the following order should be issued against the respondent.

Proposed Order

Respondent, its officers, directors, agents and employees, directly or through any corporate or other device, in connection with its livestock transactions in commerce, shall cease and desist from:

(1) Weighing livestock at other than their true and correct weights:

(2) Issuing scale tickets or accountings on the basis of false and incorrect weights;

(3) Paying the consignors of livestock on the basis of weights other than the true and correct weights; and

(4) Failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the Act constituting INSTRUCTIONS FOR WEIGHING LIVESTOCK.

Respondent shall keep accounts, records, and memoranda which fully and correctly disclose all transactions involved in its business under the Act, including among other things, scale tickets, accounts of sale, and buyers' bills, which show the true and correct weights of livestock sold by respondent on a weight basis.

Respondent is suspended as a registrant under the Act for 30 days.

/s/ Jack W. Bain
JACK W. BAIN
Hearing Examiner

August 17, 1970

Note: The foregoing is a recommended decision, not a final order. The final order will be issued by the Judicial Officer after the parties have had opportunity to file exceptions, etc., as provided by the rules of practice.

/s/ Jack W. Bain
JACK W. BAIN
Hearing Examiner

August 17, 1970

The decision and order of the Judicial Officer of the Department of Agriculture is printed at Pet. App. B.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GLOVER LIVESTOCK COMMISSION COMPANY, INC., PETITIONER
vs.
CLIFFORD HARDIN, SECRETARY OF AGRICULTURE AND THE UNITED STATES OF AMERICA, RESPONDENTS
No. 71-1092

PETITION FOR REVIEW

[Filed February 22, 1972]

Glover Livestock Commission Company, Inc., hereby petitions the Court for review of the order of the United States Department of Agriculture entered on behalf of the Secretary of Agriculture by his judicial officer wherein petitioner, Glover Livestock Commission Company, Inc., was ordered to cease and desist from certain alleged wrongful activities in the weighing of livestock and wherein further petitioner, Glover Livestock Commission Company, Inc., was suspended as a registrant under the Packers and Stockyards Act (7 U.S.C. 181 et. seq.) for a period of twenty (20) days effective March 1, 1971. Said order was entered February 5, 1971, and appears on the records of the United States Department of Agriculture as P & S Docket No. 4156.

REINBERGER, EILBOTT,
SMITH & STATEN
P.O. Box 5010
PINE BLUFF, ARKANSAS 71601
Attorneys for Petitioner, Glover Livestock Commission Company, Inc.
By [/s/ R. A. Eilbott, Jr.]

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re
GLOVER LIVESTOCK COMMISSION COMPANY, INC., RESPONDENT } P&S Docket No. 4156

STAY ORDER

PENDING OUTCOME OF COURT APPEAL

In this proceeding under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), an order was issued February 5, 1971, in part suspending respondent as a registrant under the act for a period of 20 days effective March 1, 1971. On February 16, 1971, counsel for respondent stated that a petition to review the final order was being prepared on behalf of respondent and requested that the suspension of respondent as a registrant under the act be stayed pending the outcome of the petition to review in the United States Circuit Court of Appeals for the Eighth Circuit.

The suspension of respondent as a registrant under the act contained in the order of February 5, 1971, is hereby stayed pending the determination of respondent's court appeal.

Done at Washington, D.C.
FEB. 18, 1971

/s/ THOMAS J. FLAVIN
Judicial Officer

The opinion and judgment of the Court of Appeals are printed at Pet. App. A and C.

SUPREME COURT OF THE UNITED STATES

No. 71-1545

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET. AL., PETITIONERS,

v.

GLOVER LIVESTOCK COMMISSION COMPANY, INC.

ORDER ALLOWING CERTIORARI. Filed October 24, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

☆ U.S. Government Printing Office: 1972—490-154/362

[Title Omitted in Printing]

[Hearing Examiner's] Recommended Decision

Preliminary Statement

[Filed August 17, 1970]

This is a proceeding under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), hereinafter called the Act. It was instituted by a complaint filed on May 12, 1969, by the Packers and Stockyards Administration, United States Department of Agriculture. The respondent, operator of a stockyard at Pine Bluff, Arkansas, and registered under the Act to sell livestock on commission, was charged with falsely weighing livestock sold at the stockyard, and failing to keep required records. On June 20, 1969, respondent filed an answer denying the alleged violations and requesting a hearing.

In July 1969, an oral hearing was set for Pine Bluff on October 29, 1969, but on October 16 it was continued to December 16 because of congestion in the hearing calendar in the Office of Hearing Examiners. At respondent's request, this December 16 setting was continued to January 28, 1970, and notice was given later of the location of the hearing room.

The hearing was held in the Federal Building in Pine Bluff, Arkansas, on January 28 and 29, 1970, before Chief Hearing Examiner Jack W. Bain, Office of Hearing Examiners of the Department. James S. Krzyminski and John M. Powell of the Office of the General Counsel of the Department appeared for complainant, and R. A. Eilbott, Jr., and Edward I. Staten, of Reinberger, Eilbott, Smith and Staten, Attorneys at Law, Pine Bluff, appeared for respondent. Complainant respondent presented 11 witnesses and five exhibits. The transcript contains 357 pages.

After the hearing, complainant filed proposed findings and brief on March 11, 1970, (24 pages), respondent filed its answering brief and proposals on June 4 (34 pages), and complainant replied on July 1, 1970 (9 pages).

Proposed Findings of Fact

1. The respondent, Glover Livestock Commission Company, Inc., is a corporation operating a stockyard at Pine

Bluff, Arkansas, posted as a stockyard under the Act, selling livestock on commission at the stockyard, and registered under the Act as a market agency to sell livestock in interstate commerce.

2. By letter dated August 4, 1966, respondent was notified that on June 2, 1964, and July 26, 1966, investigations had disclosed that an employee of respondent had weighed consigned livestock for sale on a weight basis at less than their true weights, and respondent was requested to take action to assure accurate weighing in compliance with the Act and regulations.

3. By a certified letter dated June 26, 1967, respondent was notified that similar short weights had been made by respondent, and respondent was again requested to take corrective action.

4. On February 25, 1969, in the transactions listed below, in selling consigned livestock on a weight basis, respondent intentionally weighed the livestock at less than their true weights, issued scale tickets and accountings to the consignors on the basis of the false weights, and paid the consignors on the basis of the false weights.

No. of Head and Description	Name of Consignor	Sales Weight (Pounds)	Weight Shown Upon Reweighing (Pounds)	Weight Difference (Pounds)
1 Calf	E. E. Silliman	300	305	5
1 Calf	J. A. McFarlin	335	350	15
1 Calf	Bobby Whithead	255	265	10
1 Calf	O. Wolfe	370	380	10
1 Calf	E. Graves	380	390	10
1 Calf	Southwest Cattle Co.	365	370	5
1 Calf	M. N. Williams	365	370	5
1 Calf	Henry Williams	360	365	5
1 Calf	Southwest Cattle Co.	245	255	10

5. Respondent kept, in connection with the above transactions, accounts and records, including scale tickets, accounts of sale, and buyers' bills, which failed to show the true and correct weights for the livestock sold.

Proposed Conclusions

The principal question here is whether the respondent

In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

GLOVER LIVESTOCK COMMISSION COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Agriculture and the United States, petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Eighth Circuit that reversed the suspension of respondent as a registered market agent.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) is reported at 454 F. 2d 109. The decision and order of the Judicial Officer of the Department of Agriculture (Appendix B, *infra*) is reported at 30 A.D. 179.

JURISDICTION

The judgment of the court of appeals (Appendix C, *infra*) was entered on January 26, 1972. On April 18, 1972, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including May 25, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals exceeded its authority as a reviewing court by setting aside the 20-day suspension of a registrant under the Packers and Stockyards Act ordered by the Secretary for a wilful violation of the Act.

STATUTES INVOLVED

The relevant Sections of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181, *et seq.*, and the pertinent provisions governing judicial review of orders under that Act, 28 U.S.C. 2341, *et seq.*, are reproduced *infra* in Appendix D.

STATEMENT

Respondent, Glover Livestock Commission Co., Inc. ("Glover") operates a stockyard in Pine Bluff, Arkansas, and is registered under Section 303 of the Packers and Stockyards Act, 7 U.S.C. 203, as a "market agency." Under the Act, Glover is authorized to sell consigned livestock on a commission basis,

and is required to comply with the various provisions of the Act and implementing regulations of the Department of Agriculture.

On three occasions prior to the present controversy (*i.e.*, on June 2, 1964, July 26, 1966 and June 20, 1967), the Department of Agriculture found that Glover had underweighed livestock which it was selling on consignment (App. A, 16). Glover was notified of those findings on August 4, 1966 and again on June 26, 1967 and was requested to institute corrective action to insure accurate weighings at the stockyard (App. A, 16-17).

After an investigation revealed that Glover had again underweighed cattle, the Department instituted the present administrative proceeding to determine whether Glover had violated the Act. After a hearing, the Secretary, acting through the Judicial Officer, found that on February 25, 1969, Glover had underweighed ("short-weighed") nine cattle by a total of 75 pounds and that its "short-weighing" and related acts violated Sections 307(a) and 312(a) of the Act, 7 U.S.C. 208(a) and 213(a), which prohibit unfair and deceptive commercial practices by market agencies [1] (App. B, 28-30, 33). The Judicial Officer

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[1] Section 307(a) declares unlawful "every unjust, unreasonable, or discriminatory regulation or practice" of a market agency. Section 312(a) prohibits engaging "in * * * any unfair, unjustly discriminatory, or deceptive practice or device in connection with * * * receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling * * *" of livestock. See App. D, *infra*.

ordered Glover to cease and desist from the violations[3] and, exercising the Secretary's authority under 7 U.S.C. 204 to suspend a registrant "for a reasonable specified period," he suspended Glover's registration under the Act for 20 days (App. B, 34).[4] The Judicial Officer stated (App. B, 33-34):

> It is not a pleasant task to impose sanctions but in view of the previous warnings given respondent we conclude that we should not only issue a cease and desist order but also a suspension of respondent as a registrant under the act but for a lesser period than [the 30 days] recommended by the complainant and the hearing examiner.

Since Glover operates its agency only on Tuesdays, the suspension would interrupt its business for at

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[3] The Secretary's order directed Glover to cease and desist from:

> (1) Weighing livestock at other than their true and correct weights;
>
> (2) Issuing scale tickets or accountings on the basis of false and incorrect weights;
>
> (3) Paying the consignors of livestock on the basis of weights other than the true and correct weights; and
>
> (4) Failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the act constituting INSTRUCTIONS FOR WEIGHING LIVESTOCK.

The order also directed Glover to maintain records reflecting the true weights of livestock sold by it in a weight basis (App. B, 34).

[4] The hearing examiner had recommended a suspension of 30 days.

most three, and perhaps only two, business days (Gov. App. 27-28).[4]

The court of appeals affirmed, as supported by substantial evidence, the Judicial Officer's findings of violation and sustained the cease-and-desist order (App. A, 21-22). The court, however, reversed the suspension. The court recognized that the Secretary was authorized, under 7 U.S.C. 204, to suspend "any registrant found in violation of the Act," and that the suspension here satisfied the pertinent requirements of the Administrative Procedure Act, 5 U.S.C. 558 (App. A, 22-23). The court stated that "the evidence indicates that Glover acted with careless disregard of the statutory requirements and thus meets the test of " 'wilfulness' " (App. A, 25). Nonetheless, it held that the suspension was "unconscionable" for two reasons (*ibid.*):

1. Since the "dominant purpose" of suspensions ordered in four prior cases under the Act was "to punish the various respondents for their intentional and flagrant conduct," suspension of Glover (whose acts—albeit wilful—were not "deliberate or flagrant") would not " 'achieve * * * uniformity of sanctions for similar violations' * * * [and is] 'unwarranted and without justification in fact.' "

2. "The cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate."

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[4] "Gov. App." refers to the "Respondent's Designation of Appendix" filed in the court of appeals.

REASONS FOR GRANTING THE WRIT

As the court below recognized, the Secretary's order suspending Glover for twenty days was authorized by the Act and was entered in compliance with the applicable requirements of the Administrative Procedure Act. The court's reversal of the brief suspension of Glover (which would affect its business for two or at most three business days) represents a serious departure from the principles established by this Court, and consistently followed by the lower courts, narrowly limiting the scope of judicial review of administrative orders. Moreover, the decision below, if left standing, could significantly impair the effective enforcement of the Packers and Stockyards Act and other similar regulatory statutes.

1. This Court has repeatedly emphasized the limited scope of judicial review of orders of administrative agencies. In *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, the Court stated (at 612-613) that review is permitted "no further than to ascertain whether the Commission made an allowable judgment in its choice of * * * remedy," and that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practice found to exist."

This narrow standard of review reflects the "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence'

* * *." *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 112. See also *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620-621. Thus, an agency's choice of appropriate remedy must stand unless it "is so lacking in reasonableness as to constitute an abuse of its discretion". *American Power Co.* v. *Securities and Exchange Commission*, *supra*, at 115. Indeed, in dealing with the "ancillary features of a valid commission order" the courts cannot overturn the agency's discretionary determination "in the absence of a patent abuse of discretion." *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413, 414; *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 250.

These principles apply with special force in this case. The Secretary is specifically authorized by statute to use suspension as an appropriate remedy and whether to impose that penalty and for how long are questions peculiarly within the Secretary's broad discretion in selecting the appropriate remedy. Other courts of appeals have recognized that if a suspension or revocation is authorized by statute for the particular violation found, they have no authority to consider its appropriateness in the particular case since that is a determination within the discretion of the agency.

In *G. H. Miller & Co.* v. *United States*, 260 F. 2d 286, certiorari denied, 359 U.S. 907, the Seventh Circuit, in an *en banc* decision (overruling a decision by a panel) sustained the *revocation* by the Secretary of Agriculture of the registration of a "futures Com-

mission merchant" under the Commodity Exchange Act. The Court held that it had no authority to disturb the Secretary's order of revocation, stating (260 F. 2d at 296):

> It is, therefore, clear to us that if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made *an allowable judgment in its choice of the remedy* and ordinarily the Court of Appeals has no right to change the penalty because the agency might have imposed a different penalty. (Emphasis in the original.)

Similarly in *Eastern Produce Co.* v. *Benson*, 278 F. 2d 606, the Third Circuit sustained an order of the Secretary of Agriculture suspending the licenses of registrants under the Perishable Agricultural Commodities Act, stating (at 610):

> The Judicial Officer considered all mitigating circumstances in arriving at his decision. Since his order is well within the allowable choice of remedy, we have no right to change the penalty because the agency might have imposed a different one.

In reversing the Secretary's suspension order in this case, the court of appeals improperly substituted its judgment for that of the Secretary with respect to a matter within the latter's discretion. The 20-day suspension of Glover's registration for its wilful violations of the Act was authorized by statute and was perforce an "allowable * * * choice of * * *

remedy" (*Jacob Siegel Co.* v. *Federal Trade Commission, loc. cit. supra*). It cannot be said to bear "no reasonable relation to the unlawful practice[s] found to exist" (*ibid.*) or that it even remotely constitutes a "patent abuse of discretion." *Moog Industries, Inc.* v. *Federal Trade Commission, supra*, at 414.

2. Neither of the grounds upon which the court of appeals relied in setting aside the Secretary's suspension order justified its action.

a. Stating that, in four other cases, the Secretary had issued suspensions for the "dominant purpose" of punishing "intentional and flagrant" violations, the court concluded that the suspension here (where the violations were "wilful," but not "intentional or flagrant") would not achieve uniformity of sanctions for similar violations. But the agency is not required to apply the same sanction in every case, nor is it barred from using more severe but authorized remedies because of leniency in the past. This Court made this clear in *Federal Communications Commission* v. *WOKO*, 329 U.S. 223, where in sustaining the Commission's refusal to renew a radio broadcasting license, it stated (at 227-228):

> Respondent complains that the present case constitutes a departure from the course which the Commission has taken in dealing with misstatements and applications in other cases. * * * The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action is too drastic, but we cannot say that the Commision is bound by anything

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appropriate and reasonable with respect to the practice the Department seeks to eliminate". But the authority to determine what constitutes an "appropriate and reasonable" remedy is for the Secretary, not the court.

3. If left standing, the decision of the court of appeals threatens seriously to frustrate the statutory purpose of providing effective protection to both sellers and buyers of livestock and the general public. Registrants under the Packers and Stockyards Act would be less likely to comply with the Act's prohibitions against improper practices if there were a significant possibility that the penalty imposed by the Secretary for violations would be judicially revised.* Further, the decision appears equally applicable to many other regulatory statutes which authorize the suspension of registrants or licensees. See, *e.g.*, the Perishable Agriculture Commodities Act, 7 U.S.C. 499h; the Commodity Exchange Act, 7 U.S.C. 8(a); the Tariff Act of 1930, 19 U.S.C. 1641(b);

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*The necessity for an effective deterrent against violations of the Act is shown by a report of the Department of Agriculture to Congress in 1969 which indicated that false weighing alone results in losses to livestock producers of approximately $15 million annually. Congress was further told that false weighing had been found at 19.4 percent of the markets and buying stations investigated in 1968, including 14.4 percent of the facilities examined on a "routine, spot check basis without any reason to suspect false weighing." Hearings before a Subcommittee of the House Committee on Appropriations, "Department of Agriculture Appropriations For 1970", Part 3, 91st Cong., 1st Sess., p. 19. The implications of the decision below, of course, are not restricted to this particular type of violation.

the Securities Exchange Act of 1934, 15 U.S.C. 78o (b)(5); and the Communications Act of 1934, 47 U.S.C. 303(m)(1).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

HARLINGTON WOOD, JR.,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
WILLIAM KANTER,
Attorneys.

MAY 1972.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-1092

GLOVER LIVESTOCK COMMISSION COMPANY, INC., PETITIONER

vs.

CLIFFORD M. HARDIN, Secretary of Agriculture, and THE UNITED STATES OF AMERICA, RESPONDENTS

On Petition to Review an Order of The Secretary of Agriculture

January 26, 1972

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

Glover Livestock Commission Company, Inc. (Glover) petitions this Court for review of a decision and order of the Judicial Officer of the United States Department of Agriculture. The Judicial Officer held that Glover violated 7 U.S.C. § § 208 and 213 of The Packers and Stockyards Act,[1] and ordered it to cease

[1] 7 U.S.C. § 208. Unreasonable or discriminatory practices generally.

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to

and desist from:

(1) Weighing livestock at other than their true and correct weights;

(2) Issuing scale tickets or accountings on the basis of false and incorrect weights;

(3) Paying the consignors or livestock on the basis of weights other than the true and correct weights; and

(4) Failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the act constituting INSTRUCTIONS FOR WEIGHING LIVESTOCK.

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the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer from rendering service on other markets or in occasional and incidental off-market transactions.

7 U.S.C. § 213. Prevention of unfair, discriminatory, or deceptive practices.

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce, of livestock.

The Judicial Officer also suspended Glover as a registrant under the act for 20 days.

The scope of our review is limited to the correction of errors of law and to an examination of the sufficiency of the evidence supporting the factual conclusions. The findings and order of the Judicial Officer must be sustained if not contrary to law and if supported by substantial evidence. Also, this Court may not substitute its judgment for that of the Judicial Officer's as to which of the various inferences may be drawn from the evidence. *Fairbank* v. *Hardin*, 429 F.2d 264 (CA 9 1970); *Swift & Co.* v. *United States*, 393 F.2d 247 (CA 7 1968) and *Capitol Packing Co.* v. *United States*, 350 F.2d 67 (CA 10 1965). Further, the Packers and Stockyards Act is remedial legislation and must be liberally construed in order to further its life and fully effectuate its public purpose to prevent economic harm to producers and consumers at the expense of middlemen. *Bruhn's Freezer Meats* v. *USDA*, 438 F.2d 1332 (CA 8 1971) and *Swift & Co.* v. *United States*, *supra*, at 253.

Glover is an operator of a "posted stockyard" in Pine Bluff, Arkansas and is registered under the Act to sell livestock on commission as a registered market agency. On or about June 2, 1964, July 26, 1966 and June 20, 1967, representatives of the USDA conducted investigations of Glover's operations under the act. On each date, the representatives reweighed several drafts of consigned livestock that Glover had weighed for sale on a weight basis at the stockyard. The reweighing apparently disclosed that the drafts had been weighed at less than their true and correct weights. On August 4, 1966 and again on June 26, 1967, Glover was notified of the check-weighing results and was requested to institute corrective action

which would assure accurate weighing at the stockyard.

Glover held a livestock auction at its stockyard from 1:30-4:30 p.m. on February 25, 1969. In attendance were two USDA representatives; one a livestock marketing specialist and the other a scales and weighing technician. Following completion [*sic*] of the sale, they selected 29 head of cattle for reweighing in 28 drafts.[2] Reweighed on Glover's scales, nine of the cattle had gained a total of 75 pounds, ten weighed the same as that shown on the weighmaster's scale tickets and nine had lost weight.[3]

As a result of this investigation, on May 12, 1969, the Administrator of the Packers and Stockyards Administration instituted these proceedings before the Secretary of Agriculture charging violations of 7 U.S.C. §§ 208, 213(a) and 221, and 9 CFR §§ 201.43(a), 201.55 and 201.71 (1971).

Sufficiency of the Evidence

Glover contends that the Judicial Officer's finding that Glover weighed livestock at less than their true and accurate weights is not supported by substantial evidence.

Roy Glover, president of petitioner, testified with support from others that the cattle reweighed could have gone through the auction ring at any time from 1:30 to 4:30 p.m. on February 25, 1969; that it is

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[2] Apparently one cow and her calf were weighed together in one "draft."

[3] The Judicial Officer noted in his findings of fact that when livestock are reweighed after an interval of time in which no food or water is available, they can be expected to show a weight loss.

normal procedure to stop the auction periodically and move cattle from one pen to another; and that some of Glover's pens contained food and water while others did not. Glover contends that this evidence "preponderates towards the finding" that the cattle that gained weight had been given food and water sometime during the three-hour auction, and that this explanation is more feasible than the Department's argument that the cattle were deliberately or carelessly short-weighed.

The Department's evidence was that immediately following the auction the two specialists introduced themselves and announced the purpose of their visit. Endeavoring to select cattle which had been yarded only in dry pens, Baird, a scales and weight technician who has conducted almost 350 check-weighing investigations such as this, was informed by Roy Glover that the cattle to be reweighed were presently penned where they were sold. Baird checked each of the pens from which the cattle were to be taken and, discovering no food or water present, proceeded to reweigh the 28 drafts.[4]

Given that cattle will tend to lose weight when they are penned without access to food and water, and assuming that the scales utilized for the weighing and reweighing are accurate(as will be discussed below), the evidence as presented would obviously allow for either of two conclusions. Either the cattle tested that had gained weight actually had access to food and water subsequent to their weighing and prior to their

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[4] Although the USDA scales and weighing technician endeavored to reweigh cattle only from "dry pens," he inadvertently reweighed five who were taken from a pen in which water was available. The five head, however, showed a total weight *loss* of 20 pounds on reweighing.

reweighing or they were weighed at less than their true and accurate weight. As already mentioned, this Court will not substitute its judgment for that of the fact finder where the facts will support various but opposing inferences. The Hearing Examiner and not this Court, had the opportunity to observe the demeanor of the witnesses. The cattle tested were initially weighed at most less than two hours before the reweighing began, a fact which limits the amount of time the cattle could possibly have had access to food and water. Additionally, we note that while discussing the weight discrepancies upon completion of the reweighing with Baird, neither Glover nor his weighmaster, Leonard, offered any explanation or information. We further note that Leonard, the one person in a position to contradict the Department's evidence, was not called by Glover to testify. See *Adamson* v. *California*, 32 U.S. 46, 60-61 (concurring opinion of J. Frankfurter 1947); *Milbank Mut. Ins. Co.* v. *Wentz*, 352 F.2d 592, 597 (CA 8 1965) and *Illinois Central R.R. Co.* v. *Staples*, 272 F.2d 829, 834 (CA 8 1959). All evidence considered, the Hearing Examiner, crediting the evidence to the effect that the cattle reweighed had had no access to food and water, could properly conclude that they had been under-weighed by Glover. Such a finding would be neither "hopelessly incredible or flatly contradict either a 'law of nature' or undisputed documentary evidence." *Fairbank* v. *Hardin*, *supra*, at 268.

Glover also contends that the weight discrepancies were caused by a malfunctioning of the scales utilized at the stockyards. Glover, who leases the stockyard facilities including the scales from an unrelated corporation, claims that contrary to the Department's evidence showing the scales were accurate, it conclusively established they were not.

On June 6, 1969, almost three and one-half months after the investigation, it accidentally learned the scales might be inaccurate. On June 9, a private scales firm authorized by the USDA to conduct livestock scale tests determined that the scales would print one or two graduations off if the ticket printing handle was slammed too hard. As a result of this report Glover caused the lessor of the stockyards to install a new scale in October. Fred G. Wagner, a field sales engineer for the firm installing the new scales, was asked by Glover to inspect the old one being replaced. Wagner testified that several internal components were worn and rusted, a result of a lack of maintenance which should have occurred over a period of time. His conclusion was that as a result of these defects, cattle running on and off the scale could cause such a thrust or shock that the scale would measure inaccurately; that at times the thrust of cattle running onto the scale could be exactly counterbalanced by the thrust of cattle departing, causing the scale to be properly balanced when not in use, and that at times the scale would also measure accurately. Wagner also testified that the scale testing procedure normally followed, placing weights upon the corners of the scale platform, would not necessarily have detected the distortions he described.

Between May 27, 1964 and February 25, 1969, some 13 scale tests were conducted and each time Glover's scales were deemed accurate and capable of correctly weighing livestock. Twice during this period Glover was notified by the USDA that investigation disclosed they had been short-weighting cattle and was requested to take immediate corrective action. The record discloses Glover did not question the accuracy of the scale until these proceedings were instituted. Furthermore, the report Glover cites dated

June 16, 1969, also concluded that the scale would "operate properly if not abused in stamping the ticket." Indeed, Wagner, whose expertise admittedly did not include scale testing and was in fact not testing Glover's scale for accuracy on the day he inspected it, acknowledged that livestock scales with a comparable degree of wear are capable of weighing accurately.

The USDA scales and weighing specialist, Baird, testified that immediately prior to the reweighing he inspected the scale and ascertained that the deck was moving freely and not wedged in any rigid position. During the weighing process he intermittently checked to see that the scale held its proper balance. Six days later Baird returned with an officer of the Arkansas Plant Board and conducted a physical examination of the deck and scale pit, a balance test and a distributed load test, concluding that the scale was performing properly.

Clearly, there was substantial evidence supporting the Judicial Officer's finding that Glover's scale was an accurate weighing instrument. We also conclude that there was substantial evidence supporting the Judicial Officer's findings that Glover violated the Act by short-weighing cattle. Glover, when it accepts cattle for sale on consignment, must operate its business as a fiduciary[6] and the Act clearly placed upon it a duty to safeguard farmers and ranchers against re-

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[6] *United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019 (CA 8 1932) and *Midwest Farmers, Inc.* v. *United States*, 64 F. Supp. 91 (D. Minn., three-judge court 1945). The weight imprinted upon the scale ticket by the market agency's weighmaster determines the amount paid by the buyer. In this light, Glover occupies a unique position of trust with respect to both the buyer and seller of livestock. Its sole objective should be to obtain the highest price obtainable under open and competitive market conditions.

ceiving less than the true market value of their livestock. *Bruhn's Freezer Meats* v. *USDA*, *supra*, at 1337. Having failed in its duty, the order to Glover to cease and desist from such practices was clearly appropriate.

Suspension of Registration

In addition to the cease and desist order, the Judicial Officer also suspended Glover as a registrant under the Act for 20 days although staying his order pending the outcome of this appeal. He stated,

> It is not a pleasant task to impose sanctions but in view of the previous warnings given respondent we conclude that we should not only issue a cease and desist order but also a suspension of respondent as a registrant under the act but for a lesser period than recommended by complainant and the hearing examiner. (The Hearing Examiner recommended a 30-day suspension.)

Glover strongly resists the suspension upon two grounds: that the suspension was in excess of the Department's statutory authority; and that the sanction imposed bears no reasonable relationship to the violation alleged and constitutes an arbitrary and discriminatory administration of the Act.

The suspension was within the Secretary's authority. 7 U.S.C. § 204 provides for the suspension of any registrant found in violation of the Act. The Administrative Procedure Act, however, provides that:

> 5 U.S.C. § 558 Imposition of Sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses --

(a) * * *
(b) * * *
(c) * * * Except in cases of wilfulness . . ., the withdrawal, suspension, revocation, or annulment of a license is lawful only, if before the institution of agency proceedings therefore, the licensee has been given——

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and
(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

* * *

Although gross neglect or acts done with careless disregard of statutory requirements may constitute a *willful* violation of the Act, see *Capitol Packing Company* v. *United States*, 350 F.2d 67, 78-79 (CA 10 1965), *Goodman* v. *Benson*, 286 F.2d 896, 900 (CA 7 1961) and *Eastern Produce Co.* v. *Benson*, 278 F.2d 606, 609 (CA 3 1960), we believe such a finding unnecessary here. Glover was given notice of its short-weighing violations in 1966 and again in 1967. Each time it was requested to comply with the Act. Glover clearly had notice of its violations and opportunity to cease such activities. See *H. P. Lambert Co.* v. *Secretary of Treasury*, 354 F.2d 819, 821 (CA 1 1965).

Glover urges this Court to exercise its 28 USC § 2106* authority to modify the order of suspension.

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*28 USC § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry

> that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

See also *Federal Trade Commission* v. *Universal-Rundle Corp.*, *supra* at 251.

Other courts of appeals have recognized that an otherwise permissible penalty is not invalid because it may be more severe than those imposed in other cases. In *G. H. Miller & Co.* v. *United States*, *supra*, where the Secretary had revoked a license, the Seventh Circuit summarily rejected an argument based upon asserted non-uniform application of sanctions, stating (260 F. 2d at 296):

> The petitioner * * * insist that the penalty here is more severe than any penalty imposed upon any other violator of the Act and cite cases where a lesser penalty was affixed. We are not impressed by such a specious argument.

In *Hiller* v. *Securities and Exchange Commission*, 429 F. 2d 856, 858-859, the Second Circuit similarly rejected the argument:

> * * * Comparison of sanctions in other cases is foreclosed, however, by our decision in Dlugash v. Securities and Exchange Commission, 373 F. 2d 107 (2nd Cir. 1967). There petitioners complained that other parties in the same proceeding suffered disproportionately less severe penalties. We concluded that, even if the penalties were disproportionate, "it is irrelevant because the sanctions imposed upon the petitioners were well within the Commission's discretion." *A fortiori*, we cannot disturb the sanctions ordered

in one case because they were different from those imposed in an entirely different proceeding. "[F]ailing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with the regulatory powers of the Commission. * * *" Tager v. Securities and Exchange Comm'n, 344 F. 2d 5, 8-9 (2d Cir. 1965).

In any event, the administrative decisions on which the court of appeals relied do not establish that the Secretary has imposed suspensions only for intentional and flagrant violations; at most, those decisions merely show that the violations there were of that character.[6]

b. The court also concluded that the "cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem

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[6] In the principal administrative decision upon which the court relied, *In re Milton Silver*, 21 A.D. 1438, the Secretary held that "[f]alse and incorrect weighing of livestock by registrants under the act is a flagrant and serious violation thereof. * * * [E]ven if respondent did not give instructions for the false weighings, his *negligence* in allowing the false weighings over an extended period brings such situation within the reach of the cited cases [sustaining sanctions] and we would still order the sanctions below" (21 A.D. at 1452, emphasis added).

Moreover, according to data provided by the Department of Agriculture, since 1950 the agency has issued approximately 150 cease-and-desist orders against market agencies for improper weighing under the Act. In all but 2 of those cases the Secretary also ordered suspensions ranging from one week to five years. Those figures illustrate the unfounded nature of the court's assumptions concerning the agency's practice.

APPENDIX B

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

P&S DOCKET NO. 4156

In re

GLOVER LIVESTOCK COMMISSION COMPANY, INC.,
RESPONDENT

DECISION AND ORDER

Preliminary Statement

This is a proceeding under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*). It was instituted by a complaint filed by the Packers and Stockyards Administration, United States Department of Agriculture. The respondent, operator of a stockyard at Pine Bluff, Arkansas, and registered under the act to sell livestock on commission, was charged with weighing and selling livestock at less than true and correct weights and with failing to keep correct records. The respondent filed an answer denying the alleged violations and requesting a hearing.

After several continuances, a hearing was held in Pine Bluff, Arkansas, on January 28 and 29, 1970, before Chief Hearing Examiner Jack W. Bain, Officer of Hearing Examiners, United States Department of Agriculture. R. A. Eilbott, Jr., and Edward W. Staten of Reinberger, Eilbott, Smith & Staten, Pine Bluff, Arkansas, appeared for the respondent. James S. Kryzminski and John M. Powell, Office of the General Counsel, United States Department of Agriculture, appeared for complainant.

After the hearing, the parties filed proposed findings and briefs. The hearing examiner issued a recommended decision to the effect that the respondent had violated the act as charged in the complaint and he proposed a cease and desist order, a record-keeping order and the suspension of the respondent as a registrant under the act for a period of 30 days. The respondent filed exceptions and oral argument upon the exceptions was held in Washington, D.C., before Judicial Officer Thomas J. Flavin on December 2, 1970.

Findings of Fact

1. The respondent, Glover Livestock Commission Company, Inc., is a corporation operating a stockyard at Pine Bluff, Arkansas, posted as a stockyard under the act, selling livestock on commission at the stockyard, and registered under the act as a market agency to sell livestock in interstate commerce.

2. By letter dated August 4, 1966, respondent was notified that on June 2, 1964, and July 26, 1966, investigations had disclosed that an employee of respondent had weighed consigned livestock for sale on a weight basis at less than their true weights, and respondent was requested to take action to assure accurate weighing in compliance with the act and the regulations.

3. By certified letter dated June 26, 1967, respondent was notified that similar short weights had been made by respondent, and respondent was again requested to take corrective action.

4. At all times material herein there was a scale at respondent's stockyard which was used to weigh livestock for sale on a weight basis. This scale was manufactured by Fairbanks-Morse Scale Company,

had a 20,000-pound capacity, and was equipped with a type-registering weigh beam having five-pound minimum graduations (CX 6).

5. On February 25, 1969, Kenneth F. Grizzell, Supervisor of the Memphis Area Office of the Packers and Stockyards Administration, and Ben D. Baird, Livestock Scales and Weighing Specialist assigned to said Memphis Area Office, visited respondent's stockyard for the purpose of reinvestigating respondent's weighing parctices. At approximately 3:15 p.m., Mr. Grizzell entered respondent's auction sales arena. He observed the selling of livestock for approximately one hour, but he was unable to observe the weighing of livestock during that time due to the location of the scale house outside of the sales arena. The sale appeared to be over at approximately 4:30 p.m., and Mr. Grizzell left the sales arena to get Mr. Baird who had remained in his automobile. Grizzell and Baird then went to the stockyard scale house and informed respondent's weighmaster, Cecil Leonard, that they wished to reweigh some livestock for check-weighing purposes. Baird then informed Roy Glover, manager of the stockyard, of the purpose of the visit, and Glover assisted Baird in getting livestock out of the pens for reweighing. Twenty-eight drafts of livestock were selected for reweighing. Of these, 27 were single head drafts, and one draft consisted of a cow and a calf. The results of the check weighing showed that nine of the drafts of livestock appeared to gain weight over their sales weights, 10 drafts showed no change in weight and nine drafts showed a weight loss when their check weights were compared with their sales weights (CX 4A; Tr. 17-18, 108) as follows:

No. Head	Buyer	Seller	Sales Weight (Lbs.)	Check Weight (Lbs.)	Gain + Loss — (Lbs.)
1	S. V. Hunt	E.E. Silliman	300	305	+5
1	"	J. A. McFarlin	335	350	+15
1	"	Sammy Conners	310	310	0
1	"	Bobby Whithead	255	265	+10
1	"	Boyd Pledger	345	345	0
Balance Zero 5:05 P.M.					
1	(Tom) Southwest Cattle Co.	W. R. Hamilton	410	410	0
1	"	O. Wolfe 2	370	380	+10
1	"	J. V. McPherson	435	435	0
1	"	E. Graves	380	390	+10
1	"	Southwest Cattle Co.	365	370	+5
1	"	M. N. Williams	365	370	+5
1	"	Henry Williams	360	365	+5
Balance Zero 5:12 P.M.					
1	Southwest Cattle Co. # 33	Southwest Cattle Co.	245	255	+10
1	" # 45	W. R. Hamilton	460	460	0
1	" # 30	John Rust Foundation	310	305	—5
1	" # 31X	"	265	260	—5
1	" # 37	Martindale Brothers	330	330	0
1	" # 33	W. R. Hawkins	290	290	0
1	" # 30	Jr. Mitchell	265	265	0

No. Head	Buyer	Seller	Sales Weight (Lbs.)	Check Weight (Lbs.)	Gain + Loss — (Lbs.)
Balance Zero 5:21 P.M.					
1	Southwest Cattle Co. (Armour)	Benny Ridgeway	1110	1100	—10
1	"	Tom Slaughter	870	855	—15
1	"	"	775	770	—5
1	"	"	820	820	0
1	"	"	310	305	—5
1	"				
Balance 5:29 P.M. Zero					
1	Blant Jones	O. L. Henderson	660	650	—10
2	"	Fred Curry	765	760	—5
1	"	Ed Reep	390	390	0
1	"	E. E. Silliman	380	375	—5
Balance Zero 5:34 P.M.					

6. When livestock which have been weighed for sale are reweighed after an interval of time, during which time interval the livestock do not receive feed or water, the livestock are normally expected to show a weight loss upon reweighing. Such weight loss is due to the shrinkage normally expected to occur when animals do not partake of feed or water over a period of time (Tr. 31, 98-99, 124-26).

7. Except for five head of livestock taken from pen 30, the drafts of livestock referred to in Finding of Fact 5 did not have access to feed or water during the interval between the time when they had been weighed by respondent for purposes of sale and the time when they were reweighed by respondent's weighmaster, Mr. Leonard, during the course of the investigation. Pen 30 contained water in a trough. However, the five head of livestock in pen 30 showed a total weight loss of 20 pounds upon reweighing (Tr. 110, 123-26, 349-51).

8. On March 3, 1969, Mr. Baird, along with Mr. Roberts, an employee of the Arkansas State Plant Board, Little Rock, Arkansas, tested respondent's livestock scale for accuracy. The scale was found to be within tolerance and was determined to be a reliable instrument for weighing livestock (CX 6; Tr. 112-13, 120-21).

9. The value of livestock sold through respondent's stockyard is determined by the price per hundredweight. Buyers are aware of and compare the shrink which they receive at various markets. Weighing livestock at less than the true and correct weight favors the buyer, in that the livestock would not show the amount of shrinkage that they would have shown if weighed accurately at the time of sale. In addition,

most sellers do not weigh their livestock before bringing them to market (CX 4D; Tr. 45, 72, 97).

10. On December 2, 1963, and again on September 14, 1967, respondent's weighmaster executed a "Weighers Acknowledgement and Agreement" in which he agreed to comply with the "Instructions for Weighing Livestock" issued by the Packers and Stockyards Administration. In addition, an abbreviated version of the "Instructions for Weighing Livestock" is posted in the respondent's scalehouse (CX 5A, 5B, 5C, 5D; Tr. 46-50). The instructions prescribe that livestock shall be weighed accurately to the nearest minimum graduation.

Conclusions

The results of the test reweighs by complainant's representatives are not in controversy, that is to say, nine drafts weighed more on the test reweighs than the weights at which the livestock was previously sold by respondent.

During the proceeding here respondent advanced several reasons for the gains in weight. Respondent claims that between the sales weighings and the test reweighs the animals involved had been moved from pen to pen and had water and feed available. Complainant's representatives testified that the pens from which the animals were selected for test reweighs did not contain feed or water, except for one pen containing water the livestock from which weighed less upon reweigh than at the time of sale. (Finding of Fact 7).

The complainant's representatives also testified that when they showed the results of the test reweighs to respondent's manager Roy Glover he offered no explanation of the weight gains. The hearing examiner who saw and heard the witnesses testify rejected the

claim of respondent that the livestock reweighed had access to feed and water between the weighing and reweighing.

Respondent also defends on the ground that the scale could have sporadically weighed inaccurately. This position is based largely upon testimony of Mr. Frank Wagner, a sales representative for Fairbanks-Morse Scale Company, who dismantled the scale involved in October 1969, *about eight months after* the transactions in issue. Mr. Wagner found some of the parts worn but did not test the scale for accuracy. He testified too upon cross-examination that he had seen scales of the type used exhibiting a similar degree of wear which were able to weigh accurately (Tr. p. 191).

Respondent's scale was found to be an accurate weighing instrument a few days after February 25, 1969, by a representative of complainant and a representative of the Arkansas State Plant Board and was accurate on February 25, 1969.

We conclude then, as did the hearing examiner, that respondent wilfully violated sections 307 and 312(a) of the act (7 U.S.C. 208 and 213(a)) by the incorrect weighings. Weighing livestock at less than its true and correct weight has long been held to be a violation of these sections of the act. See *e.g., In re Roy C. Townsend, d/b/a Madison Stockyards*, 27 A.D. 68 (1968) and the cases cited therein.

Of course the entries by respondent of the false weights upon scale tickets and accounts of sale, copies of which are part of respondent's records constituted a breach of section 401 of the act (7 U.S.C. 221).

It is not a pleasant task to impose sanctions but in view of the previous warnings given respondent we conclude that we should not only issue a cease and

desist order but also a suspension of respondent as a registrant under the act but for a lesser period than recommended by complainant and the hearing examiner.

Order

Respondent, its officers, directors, agents, and employees, directly or through any corporate or other device, in connection with its livestock transactions in commerce, shall cease and desist from:

(1) Weighing livestock at other than their true and correct weights;

(2) Issuing scale tickets or accountings on the basis of false and incorrect weights;

(3) Paying the consignors of livestock on the basis of weights other than the true and correct weights; and

(4) Failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the act constituting INSTRUCTIONS FOR WEIGHING LIVESTOCK.

Respondent shall keep accounts, records and memoranda which fully and correctly disclose all transactions involved in its business under the act, including among other things, scale tickets, accounts of sale, and buyers' bills, which show the true and correct weights of livestock sold by respondent on a weight basis.

Respondent is suspended as a registrant under the act for 20 days effective March 1, 1971.

Done at Washington, D. C.

February 5, 1971

Thomas J. Flavin
Judicial Officer

APPENDIX C

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1971

NO. 71-1092

GLOVER LIVESTOCK COMMISSION COMPANY, INC., PETITIONER

vs.

CLIFFORD HARDIN, Secretary of Agriculture, and THE UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of Order of the Secretary of Agriculture

This Cause came on to be heard on the petition for review of order of the Secretary of Agriculture dated February 5, 1971, (P.S. Docket No. 4156) the appendix and briefs of the respective parties, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said Secretary of Agriculture be, and is hereby, affirmed as modified, in accordance with the opinion of this Court this day filed herein.

January 26, 1972

Costs taxed in favor of Respondents in the U. S. Court of Appeals for the 8th Circuit:	
Cost of reproducing Respondents' brief:	$220.78
Total costs of respondents for recovery from Petitioner in the U. S. Court of Appeals for the 8th Circuit.	$220.78

[SEAL]

A true copy.

Attest:

Robert C. Taskes

Clerk, U.S. Court of Appeals, 8th Circuit.
by W. F. Grueninger, Chief Deputy

February 24, 1972

APPENDIX D

STATUTES INVOLVED

The relevant Sections of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181, *et seq.*, provide in pertinent part:

7 U.S.C. 204:

> * * * whenever, after due notice and hearing, the Secretary finds any registrant * * * has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction.

7 U.S.C. 208(a):

> * * * every unjust, unreasonable, or discriminatory * * * practice is prohibited and declared to be unlawful.

* * * *

7 U.S.C. 213(a):

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with * * * receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce, of livestock.

Ordinarily it is not for the courts to modify ancillary features of agency orders which are supported by substantial evidence. The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters, and so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere. 28 USC § 2106 does not allow appellate courts to enter the more spacious domain of public policy which Congress has entrusted in the various regulatory agencies. See *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958); *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941); *Eastern Produce Co.* v. *Benson*, *supra*, at 610; *G. H. Miller & Co.* v. *United States*, 260 F.2d 286 (CA 7 1958) and *Midwest Farmers, Inc.* v. *United States*, *supra*, at 101-102.

The Department refers us to four decisions of the Secretary in which suspensions of registration are imposed for short-weighing consigned cattle. *In re Townsend*, 27 A.D. 68 (1968); *In re Farmers Commission Co., Inc.*, 24 A.D. 1491 (1965); *In re Wayne County Livestock Exchange, Inc.*, 23 A.D. 185 (1964) and *In re Milton Silver*, 21 A.D. 1438 (1962). In all four it was clearly established that the complained of conduct was intentional—in each the respondent had deliberately "back-balanced" or set the scale back behind zero so that it would short-weigh livestock. And it is apparent that the dominant purpose of the sus-

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of such appropriate judgment, decree, order, or require such further proceedings to be had as may be just under the circumstances.

pensions imposed was to punish the various respondents for their intentional and flagrant conduct.

Here to say the least, the evidence indicates that Glover acted with careless disregard of the statutory requirements and thus meets the test of "wilfulness,"[7] but its conduct was not shown to be deliberate or flagrant. Although we fully appreciate the seriousness of the offenses committed by Glover, a suspension would not "achieve . . . uniformity of sanctions for similar violations" (see *In re Milton Silver*, *supra*, at 1452) and it appears to us to be "unwarranted and without justification in fact." *American Power & Light Co.*, *supra*, at 112-113. The cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate. Under these circumstances a suspension would be unconscionable. We reverse as to the suspension of Glover as a registrant under the Act.

The Secretary's order is affirmed as modified.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit,

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[7] *Capitol City Packing Co., supra.*

The provisions governing judicial review of this case in the court of appeal, 28 U.S.C. 2341, *et seq.*, provide in pertinent part:

28 U.S.C. 2342:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> * * * *
>
> (2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;
>
> * * * *
>
> Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. 2349(a):

> The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1545

EARL L. BUTZ, SECRETARY of AGRICULTURE, And The UNITED STATES Of AMERICA
PETITIONERS

v.

GLOVER LIVESTOCK COMMISSION COMPANY, INC.

RESPONDENTS BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Secretary filed its initial complaint against Glover on May 13, 1969, (App. A) and by letter dated May 20, 1969, (App. B) counsel for the Secretary offered Glover an opportunity to enter into a consent order, containing a 30-day suspension, (App. C) the

acceptance of which would have terminated these proceedings. Glover declined to accept the Secretary's position and by the filing of its answer set in motion the administrative processes that brought this matter through the judicial review of the Eighth Circuit and now to this Court on the Secretary's petition. The Court of Appeals below affirmed the Secretary on all counts but modified so much of the Secretary's order that imposed a temporary suspension of Glover's registration under the Act.

Glover accepted the judgment of the Court of Appeals and sought no further judicial review and it will accept for the purpose of its argument in opposition to this petition that the suspension in issue was not in excess of the Department's statutory authority. However, Glover does not abandon, for any purpose, the position it has maintained throughout the period of over three years this matter has been pending, that the sanction imposed bore no reasonable relationship to the violation administratively found to exist and constitutes an arbitrary and discriminatory administration of the Act.

The Solicitor General authorized the filing of the petition for a writ of certiorari and now brings the same on behalf of the Secretary of Agriculture and of the United States of America. A fair summary of the grounds relied upon in seeking this petition would seem to be as follows:

1. If an order of suspension or revocation of an administrative agency is authorized by statute, it cannot be judicially overturned unless it bears no reasonable relation to the unlawful practice

found to exist or constitutes a patent abuse of discretion.

2. Neither of the following grounds upon which the Court of Appeals apparently relied in setting aside the Secretary's suspension order justified its action:

(a) A suspension would not achieve uniformity of sanctions for similar violations.

(b) The cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate.

3. The decision of the lower court, if left standing, would constitute a threat to the statutory purpose of the Act in question and of other regularatory statutes, in that registrants would be less likely to comply with the applicable prohibitions against improper practices, if there were a significant possibility that any penalty imposed by the agency for volation of those prohibitions would be judicially revised.

1. As to the Secretary's first point, Glover concedes that orders of administrative agencies, if authorized by statute, are subject only to a limited scope of judicial review. Whatever the particular choice of words utilized to describe or define those limitations, in a particular case, the courts have consistently not interfered with an administrative determination relevant to factual matters if such a determination involved a complex problem about which the agency had accumulated experience and knowledge unobtainable

by the courts from the record before it. Further, this court and those acting under its rulings, has not interfered with an administrative choice of remedy merely because it was felt that another choice would have been preferable under the circumstances.

However, there has been no judicial abdication by the Courts as to its supervision over administrative action, as authorized and desired by Congress, even as to fact findings of an agency. "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion."—"Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body."—*Burlington Truck Lines v. United States*, 371 U. S. 156, 167.

Likewise, the courts have not withdrawn judicial protection to our citizens in the area of administrative choice of remedies. The remedy chosen will not stand if it is "unwarranted in law or is without justification in fact—" *American Power & Light Company v. S. E. C.* 329 U. S. 90, 112-113.

Cognizant of the potential hazards of unbridled administrative discretion, Congress has wisely devised a scheme whereby "agencies and courts together constitute a 'partnership' in furtherance of the public interest." *Columbia Broadcast System, Inc. v. F.C.C.* 454 F2d 1018, 1028 (C.A.D.C. 1971).

It, therefore, seems abundantly clear that no administrative action of any kind or character will stand the light of judicial review on the bare premise that

such action was within the statutory powers granted. The laudable efficiencies made possible by the tremendous powers granted the administrative agencies carry with them the inherent danger of irreparable damage from even the slightest abuse of that power and restraint, to the utmost degree, should be exercised by those agencies. Administrative efficiency alone should not be, and surely will never be, a sufficient reason to insulate an agency from judicial injuiry on behalf of a citizen with an alleged wrong.

2. Turning to the reasons given by the court below in modifying the Secretary's order relevant to the suspension, Glover would submit that either reason would be more than sufficient to justify the court's action in view of the fact the court found that "under these circumstances a suspension would be *unconscionable.*" (Emphasis supplied.) (Petitioners App. A. 25). The circumstances were, of course, the factual findings of the Secretary which were affirmed by the Court of Appeals. If a suspension is *unconscionable*, then it necessarily follows that it "bears no reasonable relation to the unlawful practice found to exist.", "is so lacking in reasonableness as to constitute and abuse of discretion.", and is "a patent abuse of discretion."

(a) One of the two reasons given by the court below for its actions was that a suspension against Glover "would not achieve uniformity of sanctions for similar violations." The general administrative law does not require absolute uniformity of sanctions nor uniformity of any particular administrative position, *but the agency must give a reason when it reverses course. Secretary of Agriculture v. United States*, 347 U. S. 645, 653-654.

"A simple but fundamental rule of administrative law—is—that a reviewing court in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If the grounds are inadequate or improper, the court is powerless to affirm the administrative action.—" *Burlington Truck Line v. United States*, supra at 169.

The desirability of invoking uniform sanctions was a position embraced by the Secretary and not first espoused by the court below. The Judicial Officer cited as authority for his position In re *Roy C. Townsend, d/b/a Madison Stockyards*, 27 A.D. 68 (1968) and the cases cited therein. (Petitioner's App. B, 33). Those cases, of which there are four, are consistently cited by the Department in opinions involving suspension orders in weight violation cases. The first decided of these four is In re *Milton Silver*, 21 A. D. 1438 (1962) and is obviously considered by the Department as being the leading and controling case on the question of suspensions and that the violations found there set the standard against which violations of other market agencies should be measured in deciding whether or not a suspension should be ordered. *In all cases except Glover.*

Therefore, the Secretary decided in 1962 that there should be uniformity as to suspensions for weight violations by the following language from *Silver* at page 1452:

"—Also respondent should be suspended as a registrant under the Act for a period of thirty

days, which is less than that recommended by complainant, to achieve some uniformity of sanctions for similar violations of the Act in other cases."

The Secretary's Judicial Officer may have indicated that the negligence of the respondent there in allowing the false weighings over an extended period of time would have been sufficient basis for the sanctions invoked, as mentioned by the petitioners in the footnote at page 11 of their brief, but the fact is that such negligence was not relied upon by the Secretary whose Judicial Officer made a specific finding based upon the eyewitness testimony of the Department's District Supervisor that the scales were back-balanced when used in his presence, an affadavit of the weighmaster that he intentionally underweighed livestock on instructions from his employer, 21 check weighings of various types and other documented evidence clearly establishing a pattern of deliberate and intentional short weighing practices. He summarized his findings with this language:

"In view of the foregoing, it is concluded that during the period January 5 through March 2, 1961, respondent willfully and *intentionally* violated Sections 307 and 312 (a) of the Act—and sections— of the regulations issued thereunder—by weighing calves in commerce at the stockyard at less than their true and correct weight, that is, weighing calves falsely and incorrectly, and by reason of the means employed to achieve that result, that is by *knowingly* weighing calves when the livestock scales were not in balance,—." (Emphasis supplied)

Uniformity of sanctions was found desirable by the Secretary in 1962 and there is nothing in the record that the Department has departed from nor finds it advisable to depart from that long standing position. The same is true as to the practice of invoking suspensions only when the weighing violation is found to have been done intentionally and knowingly. It must necessarily follow that the Department feels that effective enforcement of the Packers and Stockyards Act can best be served by adherence to these principles.

The Secretary's Hearing Examiner rejected Glover's claim that any weight gains as to the reweighed animals was due to the fact that such animals had access to feed and water. At the conclusion of his finding on this point he stated as follows:

> "Although all of the persons connected with the ownership of the respondent corporation who attended the hearing appeared to be admirable individuals, it is reluctantly concluded that the claim of pen shifts between weighings is unsupported.—." (Glovers App. 13)[1]

His proposed order was identical with that of the Secretary's Judicial Officer except that he ordered a suspension for a lesser period than recommended by the Secretary's administrator and by the Secretary's Hearing Examiner. In neither the Hearing Examiner's recommended decision nor the decision of the Judicial Officer is there even a hint of a suspicion that Glover intentionally, or deliberately or knowingly or flagrantly violated the Act.

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[1] "Glover App" refers to Glovers Appendix filed in the Court of Appeals.

There never has been a suspension, of a registration under the Act in question sanctioned by the Department of Agriculture in the absence of intentional and flagrant violations thereof. Glover so stated in its brief submitted to the court below May 25, 1971, over a year ago, no decision of the Department was cited to the contrary in the Secretary's brief, the question was again raised during oral argument of this matter in the court below and the attorney for the Secretary was invited by one of the Circuit Judges, even at that late date, to furnish the citation to any such case, none came and none being cited in the petitioner's brief before this Court, surely it must be assumed that none such exists.[2]

It necessarily follows that the Court of Appeals was entirely justified in modifying the Secretary's order as to the suspension for the reasons just discussed.

(b) As to the choice of remedy the question is not the power of the Secretary but rather the power of the courts to review the Secretary's actions.

The unanimous court below found the suspension to be "unwarranted and without justification in fact.", and further that under the circumstances a suspension would be "unconscionable." The current edition of

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[2]The statistics provided the Soliciter General by the Department of Agriculture and referred to in the footnote to page 11 of Petitioners Brief neither served to supply this lack of such an Agency Decision nor forms the basis for questioning the finding of the court below. Further the document apparently reflects 6, not 2 cease-and-desist orders without accompanying suspensions (The Soliciter General was kind enough to furnish Glover's counsel with a copy) and Glover found and discussed in detail 3 such reported decisions in its brief to the Court below.

Webster's Unabridged Dictionary defines "unconscionable" as:

"1. Unreasonable; exceeding the limits of any reasonable claim or expection; immoderate; as, an 'unconscionable demand'.

2. Not guided or influenced by conscience, unscrupulous."

If the Eighth Circuit Court of Appeals had any power whatsoever to review the penalty invoked against a citizen by the United States Department of Agriculture, surely those powers would include modification of a penalty to the extent the court found such penalty to be "unconscionable". Even a finding that an administrative order constituted a "patent abuse of discretion", pales into insignificance as against a finding that such an order was "unconscionable".

If an agency of the Federal Government orders a penalty against any person, firm or corporation that "exceeds the limits of any reasonable claim or expectation," then it should not be sustained by any rule of law and be unconstitutional on its face.

3. The reason why Glover is here today is probably found in the final point raised by the petitioners. If, in fact, a precedent has been established by Glover's actions in exercising its rights to be heard as to the damaging accusations made against it by the Federal Government, it should not be further penalized simply because it exercised those rights. It should not once again be subjected to the damaging publicity of this matter that will be generated by a government

sponsered news release.[3] Further, a reversal as to Glover's partial vindication below would not seem likely to invite deliberate, intentional and flagrant violations of the provisions of any regulatory statute, but it could very likely force otherwise innocent persons or organizations, who need a federal registration to remain in business, to accept an agency's offer of a consent order simply because they had lost confidence that the courts would give them any relief, regardless of the merits of their position.

CONCLUSION

It is respectfully submitted that no valid reasons have been advanced, nor do any exist for the granting of the petition and that it, therefore, should be denied.

EDWARD I. STATEN
Attorney at Law
P. O. Box 5010
Pine Bluff, Arkansas 71601

July, 1972

[3]App. D E&FR are examples of the method employed.

APPENDIX A

UNITED STATES DEPARTMENT
OF AGRICULTURE

May 13, 1969

CERTIFIED RECEIPT REQUESTED

Glover Livestock Commission Company, Inc.
Pine Bluff, Arkansas 71601

Gentlemen:

Subject: *In re Glover Livestock Commission Company, Inc., Respondent*—P. & S. Docket No. 4156

Enclosed is a copy of a complaint filed with this office under the Packers and Stockyards Act, 1921, as amended.

In accordance with the rules of practice governing proceedings under the Packers and Stockyards Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and three copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

Your answer, as well as any motions or requests that you may wish to file hereafter in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, Office of the Secretary, United States Department of Agriculture, Washington, D. C. 20250.

Sincerely yours,
Eugene R. Meyer
Hearing Clerk

Enclosures—2

APPENDIX B

UNITED STATES DEPARTMENT OF ARGRICULTURE

OFFICE OF THE GENERAL COUNSEL

Glover Livestock Comission Company, Inc.
Pine Bluff, Arkansas 71601 May 20, 1969

Gentlemen:

Subject: In re Glover Livestock Commission Company, Inc. Respondent. P. & S. Docket No. 4156.

This is with reference to the Complaint filed in the above-captioned matter charging you with violations of the Packers and Stockyards Act. Your answer to such Complaint is due within 20 days after service of the Complaint upon you.

This matter may be disposed of by the Consent Order Procedure, without hearing, if you so desire. There are enclosed copies of a form of answer consenting to a specified order. If you desire to dispose of this matter without a hearing, you should execute the original and three copies of the enclosed answer and return them to the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250. If you elect to follow the Consent Order Procedure, the complainant will recommend that the Order consented to be issued, and the final Order will be submitted to the Judicial Officer of the Department without further proceedings.

If, however, you desire a hearing with reference to the matters alleged in the Complaint, you should file an answer as specified in the Complaint and the

rules of practice, and the hearing will be held in due course.

If you have any questions with reference to this matter, you may take them up with the Area Supervisor, Packers and Stockyards Administration, or directly with me. The name and address of the Area Supervisor are: Mr. Kenneth F. Grizzell, Room 831, Federal Building, 167 North Main Street, Memphis, Tennessee 38103.

Sincerely,

RONALD M. GASWIRTH
Attorney for Complainant

Enclosures

APPENDIX C

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	P. & S. Docket
Glover Livestock Commission Company, Inc.,	)	No. 4156
Respondent	)	Answer

In answer to the Complaint filed in this proceeding, respondent states as follows.

1. Respondent admits the facts alleged in paragraph 1 of the Complaint and further admits that the Secretary has jurisdiction in this matter.

2. Respondent neither admits nor denies the remaining allegations contained in the Complaint.

3. Respondent, for the purposes of this proceeding and for such purposes only, consents to the issuance of an order containing findings of fact and conclusions based upon the allegations set forth in the Complaint as the findings of fact and conclusions of the Secretary of Agriculture.

4. Respondent waives oral hearing and the report of the Hearing Examiner and consents to the entry of the order set forth below, which order shall have the same force and effect as if entered after full hearing and shall be effective on the sixth day after service upon respondent.

ORDER

Respondent, its officers, directors, agents, and employees, directly or through any corporate or other device, in connection with its livestock transactions in commerce, shall cease and desist from: (1) weighing livestock at other than the true and correct weights; (2) issuing scale tickets or accountings on the basis of false and incorrect weights; (3) paying the consignors of livestock on the basis of weights other than the true and correct weights; and (4) failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the Act constituting INSTRUCTIONS FOR WEIGHING LIVESTOCK.

Respondent shall keep accounts, records, and memoranda which fully and correctly disclose all transactions involved in its business under the Act, including among other things, scale tickets, accounts of sale, and buyers bills, which show the true and correct weights of livestock sold by respondent on a weight basis.

The respondent is suspended as a registrant under the Act for a period of 30 days.

This order shall become effective on the sixth day after service upon respondent. Copies hereof shall be served upon the parties.

APPENDIX D

UNITED STATES DEPARTMENT OF AGRICULTURE

Sylvester DU 8-7415

Washington, Feb. 17, 1971

McDavid DU 8-4026

Arkansas Livestock Firm Suspended for Violating P&S Act:

Glover Livestock Commission Company, Inc., of Pine Bluff, Ark., has been suspended as a registered livestock market for violating weighing and accounting requirements under the Packers and Stockyards Act, the U. S. Department of Agriculture said today.

The firm operates a stockyard, and is registered as a livestock market agency to sell in commerce.

USDA Judicial Officer Thomas J. Flavin suspended Glover Livestock Commission Company, Inc.'s registration under the P&S Act for 20 days, starting March 1, 1971. The firm may not operate as a market agency during that time.

The firm, its officers, directors, agents, and employees were also ordered to cease and desist from:

(1) Weighing livestock at other than their true and correct weights;

(2) Issuing scale tickets on the basis of false and incorrect weights;

(3) Paying livestock consignors on the basis of false weights; and

(4) Failing to operate its livestock scales in accordance with P&S regulations.

The firm was also ordered to keep complete accounts and records which correctly disclose all transactions involved in its business under the Act.

The cease and desist order—like a permanent injunction—was issued to insure future compliance with the P&S Act.

Glover Livestock Commission Company, Inc. requested an oral hearing on the complaint. It was held before a USDA Hearing Examiner on January 28-29, 1970, in Pine Bluff, Arkansas.

After the Hearing Examiner issued a recommended decision, the firm filed exceptions and oral arguments were held in Washington, D. C., before Judicial Officer Thomas J. Flavin on Dec. 2, 1970.

The P&S Act is a fair trade practices law. It promotes and maintains fair and open competition in the marketing of livestock, poultry and meat.

The record in this case is open to the public. Copies of the order, P&S Docket 4156, may be obtained from the Information Officer, Packers and Stockyards Administration, USDA, Washington, D. C. 20250

APPENDIX E

ARKANSAS GAZETTE
March 3, 1971

To Whom It May Concern:

Enclosed is the article concerning the suspension of Glover Livestock Auction Co. The article is by United Press International and moved from that press service's Washington Bureau.

LEROY DONALD
State Editor

APPENDIX F

UNITED STATES DEPARTMENT OF AGRICULTURE

Sylvester DU 8-7415

Washington, Feb. 23, 1971

McDavid DU 8-4026

Arkansas Livestock Firm's Suspension is Stayed:

The suspension of Glover Livestock Commission Company, Inc., of Pine Bluff, Ark., has been stayed pending the outcome of the firm's appeal to the Eighth Circuit Court, the U. S. Department of Agriculture said today.

In an order issued Feb. 5, 1971, USDA Judicial Officer Thomas J. Flavin found Glover Livestock Commission Company, Inc. in violation of accounting and weighing regulations under the Packers and Stockyards Act, a fair trade practices law. Its registration as a market agency was suspended, beginning March 1, 1971.

The Judicial Officer has now stayed the order until the U. S. Circuit Court of Appeals for the Eighth Circuit issues its decision.

Proceedings of this case are open to the public. Copies of the order, P&S Docket 4156, may be obtained from the Packers and Stockyards Administration, USDA, Washington, D. C. 20250.

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CITATIONS

Cases:

Cases—Continued

Cases—Continued

[illegible]

Stone, Melvin, [illegible]

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Tager v. Securities and Exchange Commission, 344 F. 2d 5 [illegible]

[illegible]

252 [illegible]

[illegible]

Statutes:

Administrative Procedure Act [illegible]

Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181 et seq. [illegible]

[illegible]

Miscellaneous:

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1545

EARL L. BUTZ, SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

GLOVER LIVESTOCK COMMISSION COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 454 F. 2d 109. The decision and order of the Judicial Officer of the Department of Agriculture (Pet. App. B) is reported at 30 A.D. 179.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on January 26, 1972. On April 18, 1972, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including May

25, 1972. The petition for a writ of certiorari was filed on May 25, 1972 and was granted on October 24, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals exceeded its authority as a reviewing court by setting aside the 20-day suspension of a registrant under the Packers and Stockyards Act ordered by the Secretary for a wilful violation of the Act.

STATUTES INVOLVED

The relevant provisions of the Packers and Stockyards Act of 1921, 7 U.S.C. 181 *et seq.*, and of the Judicial Code (28 U.S.C.) are set forth in the Appendix, *infra*, pp. 24–26.

STATEMENT

Respondent, Glover Livestock Commission Co., Inc., operates a stockyard in Pine Bluff, Arkansas, and is registered under Section 303 of the Packers and Stockyards Act, 7 U.S.C. 203, as a "market agency." As a registrant, respondent may sell consigned livestock on a commission basis but must comply with certain requirements set forth in the Act (7 U.S.C. 201–217a) and in implementing regulations of the Department of Agriculture (9 C.F.R. Part 201).[1] In particular, respondent was required "to establish, observe, and enforce just, reasonable, and nondiscrimina-

[1] The statute and regulations governing the operation of market agencies are designed to protect the interests of the consignors and purchasers of livestock, who must rely upon the market agency in the handling of their transactions, and

tory regulations and practices" (7 U.S.C. 208(a)), and to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions" (7 U.S.C. 221), and was prohibited from engaging in or using "any unfair, unjustly discriminatory, or deceptive practice or device in connection with * * * the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling * * * of livestock" (7 U.S.C. 213(a)).

On three occasions prior to the present controversy (*i.e.*, on June 2, 1964, July 26, 1966 and June 20, 1967) the Department of Agriculture had found that respondent had underweighed livestock which it had sold on consignment (Pet. App. A, 16). Respondent had been notified of those findings and requested to institute corrective action to insure accurate weighing at the stockyard (Pet. App. A, 16–17).

On February 25, 1969, an investigation revealed that respondent had again underweighed certain cattle, and as a result of that investigation the present proceeding was instituted (Pet. App. A, 17). After a hearing

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the public interest in general. See, *e.g.*, *Midwest Farmers* v. *United States*, 64 F. Supp. 91, 95 (D. Minn). To that end, the statute and regulations prescribe, *inter alia*, practices with regard to weighing, record keeping, and the conduct of sales, in order to insure fair and honest treatment to both buyers and sellers. See, *e.g.*, 7 U.S.C. 203, 204, 207, 208; 9 C.F.R. 201.10, 201.29, 201.39–201.85. As this Court has recognized, this comprehensive regulatory statute thus "treats the various stockyards as great national public ntilities * * *." *Stafford* v. *Wallace*, 258 U.S. 495, 516. See also *Denver Union Stockyard Co.* v. *Producers Livestock Marketing Association*, 356 U.S. 282, 286, 289.

and the submission of briefs, the Department of Agriculture hearing examiner found that "[o]n February 25, 1969, * * * in selling consigned livestock on a weight basis, respondent intentionally weighed the livestock at less than their true weights, issued scale tickets and accountings to the consignors on the basis of the false weights, and paid the consignors on the basis of the false weights" (App. 35). For these violations of respondent's statutory duties, the hearing examiner proposed, in addition to cease-and-desist orders and an order to keep correct accounts, a 30-day suspension of respondent's registration (App. 37).

The matter was then referred to a Judicial Officer having authority to act on behalf of the Secretary. After the filing of exceptions and oral argument, the Judicial Officer reviewed the evidence and ruled (Pet. App. B, 33–34):

> We conclude then, as did the hearing examiner, that respondent wilfully violated sections 307 and 312(a) of the act (7 U.S.C. 208 and 213(a)) by the incorrect weighings. Weighing livestock at less than its true and correct weight has long been held to be a violation of those sections of the act. See, *e.g., In re Ray C. Townsend, d/b/a Madison Stockyards,* 27 A.D. 68 (1968) and the cases cited therein.
>
> Of course the entries by respondent of the false weights upon scale tickets and accounts of sale, copies of which are part of respondent's records constituted a breach of section 401 of the act (7 U.S.C. 221).

> It is not a pleasant task to impose sanctions but in view of the previous warnings given respondent we conclude that we should not only issue a cease and desist order but also a suspension of respondent as a registrant under the act but for a lesser period than recommended by [the Packers and Stockyards Administration] and the hearing examiner.

Respondent's registration was suspended for 20 days (Pet. App. B).[2] Since respondent operates only on Tuesdays, the suspension would interrupt its business for at most three business days (App. 13–14).

After an extensive review of the testimony and other evidence, the court of appeals upheld, as supported by substantial evidence, "the Judicial Officer's findings that [respondent] violated the Act by short-weighing cattle" (Pet. App. A, 21), and sustained the Secretary's cease-and-desist order (Pet. App. A, 22). However, the court set aside the 20-day suspension order (Pet. App. A, 25).

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[2] The Secretary's order also directed respondent to cease and desist from:

(1) Weighing livestock at other than their true and correct weights;

(2) Issuing scale tickets or accountings on the basis of false and incorrect weights;

(3) Paying the consignors of livestock on the basis of weights other than the true and correct weights; and

(4) Failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the Act.

The order further directed respondent to maintain records reflecting the true weights of livestock sold by it on a weight basis (Pet. App. B, 34).

The court ruled that the order was within the Secretary's authority under 7 U.S.C. 204, which provides that "whenever * * * the Secretary finds any registrant * * * has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period." The court also held that the order complied with the pertinent requirements of the Administrative Procedure Act, 5 U.S.C. 558, since respondent had been given notice of prior violations and an opportunity to achieve compliance with the statutory requirements. The court further noted (Pet. App. A, 24):

> Ordinarily it is not for the courts to modify ancillary features of agency orders which are supported by substantial evidence. The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters, and so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere. * * * [A]ppellate courts [may not] enter the more spacious domain of public policy which Congress has entrusted in the various regulatory agencies. * * *

Nevertheless, the court reversed the suspension order as "unconscionable" (Pet. App. A, 25). The court, apparently relying on its conclusion that respondent had not acted deliberately or flagrantly but only with careless disregard of the statutory requirements, held:

1. Since, in the court's view, the "dominant purpose" of suspensions ordered by the Secretary in

four other cases had been "to punish the various [registrants] for their intentional and flagrant conduct," suspension of respondent would not "'achieve * * * uniformity of sanctions for similar violations * * * [and therefore would be] unwarranted and without justification in fact'" (Pet. App. A, 24–25).

2. In these circumstances "[t]he cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate" (Pet. App. A, 25).

SUMMARY OF ARGUMENT

In setting aside the Secretary's 20-day suspension of respondent's registration, the court of appeals exceeded the scope of proper judicial review of administrative sanctions. As this Court has noted, "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence' * * *" (*American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 112), and therefore judicial interference with statutorily permissible administrative remedial orders is unwarranted "'in the absence of a patent abuse of discretion'" (*Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 250). This consideration is particularly applicable to the review of administrative orders imposing sanctions for the violations of statutory requirements, for the determination of the sanc-

tion or sanctions necessary to deter future violations is a matter peculiarly within the expertise of the administrator. Thus other courts of appeals, in reviewing orders by the Secretary imposing sanctions for violations similar to those committed by respondent, have recognized that judicial review of such orders is limited to a determination of whether the Secretary made an allowable choice of remedy.

In this case, the 20-day suspension ordered by the Secretary was authorized by the Packers and Stockyards Act. Under the Act, market agencies, like respondent, are treated as "great national public utilities" (*Stafford* v. *Wallace*, 258 U.S. 495, 516) and are held to quasi-fiduciary standards in their dealings with buyers and sellers. Repeated underweighing of consigned cattle "with careless disregard of the statutory requirements" (Pet. App. A, 25) violates the statute and constitutes a breach of the public trust. Such violations must be deterred in order to achieve fully the statutory purpose of protecting producers, buyers, and the public from "unfair * * * practices in the meat industry" (*De Vries* v. *Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn.), affirmed, 199 F. 2d 677 (C.A. 8), certiorari denied, 344 U.S. 934). Congress recognized the need for such deterrence by granting the Secretary authority, upon finding that "any registrant * * * has violated [the Act, to] * * * issue an order suspending such registrant for a reasonable specified period." 7 U.S.C. 204. The brief 20-day suspension ordered by the Secretary here was reasonable, especially in light of respondent's repeated violations of the Act.

The grounds stated by the court of appeals did not justify setting aside the suspension. The court improperly attempted to insure that the sanctions imposed by the Secretary were uniform in all cases. But the Secretary is not required to apply the same sanction in every case. To the contrary, it is his responsibility to achieve compliance with the Act, and this may from time to time require changes in policy with respect to sanctions imposed on violators. And as this Court has noted, "'the [administrator] alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress * * *.'" *Federal Trade Commission* v. *Universal-Rundle Corp., supra,* 387 U.S. at 251. "Failing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with [administrative] regulatory powers * * *." *Tager* v. *Securities and Exchange Commission,* 344 F. 2d 5, 9 (C.A. 2).

Moreover, the distinction which the court of appeals drew between "wilful" and "intentional and flagrant" violations is misleading, for suspensions of registrants are designed to obtain compliance with the Act and not primarily to punish violators. But in any event, the court of appeals was in error in concluding that the Secretary had previously limited his imposition of suspensions to intentional and flagrant violations. It has long been the practice of the Secretary to impose suspension without a finding of a deliberate and flagrant violation.

The court of appeals improperly substituted its judgment for that of the Secretary in concluding that

because respondent had suffered unfavorable publicity a lesser sanction would be appropriate and reasonable. Such an independent determination of the nature and degree of the sanctions necessary for proper enforcement of the Act constituted a "forbidden judicial intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 670.

ARGUMENT

THE COURT OF APPEALS EXCEEDED THE SCOPE OF PROPER JUDICIAL REVIEW OF ADMINISTRATIVE SANCTIONS IN SETTING ASIDE THE SECRETARY'S 20-DAY SUSPENSION OF RESPONDENT'S REGISTRATION

A. JUDICIAL REVIEW OF ADMINISTRATIVE ORDERS IMPOSING SANCTIONS IS LIMITED TO DETERMINING WHETHER THE AGENCY MADE AN ALLOWABLE CHOICE OF REMEDY

This Court has recognized and stressed that the judiciary exercises only a very limited power of review over orders fashioned by an administrative agency in implementation of its statutory responsibility. Thus, in *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, the Court, noting (at 112) that a narrow scope of review was mandated by the "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence' * * *," concluded (at 118):

> Our review is limited solely to testing the propriety of the remedy so chosen from the stand-

> point of the Constitution and the statute. We would be impinging upon the Commission's rightful discretion were we to consider the various alternatives in the hope of finding one that we consider more appropriate. * * *

The Court there affirmed a corporate dissolution ordered by the Securities and Exchange Commission, finding that the order was authorized by statute and was not "so lacking in reasonableness as to constitute an abuse of [the Commission's] discretion" (329 U.S. at 115).

Similarly, in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414 and *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 250, the Court noted that a reviewing court may not interfere with an administrative remedial order "in the absence of a patent abuse of discretion." And in *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 618–621, and *Barsky* v. *Board of Regents*, 347 U.S. 442, 455, the standard of review applied was whether the agency action was arbitrary, capricious, or an abuse of discretion.[3]

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[3] In dealing with corrective sanctions (*i.e.*, sanctions designed to correct currently illegal conditions) the Court has sometimes found it additionally necessary to utilize a "rational basis" test to determine whether the administrative order was reasonably related to the elimination of the illegal condition. See *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608. But this is a broader scope of review than is needed in cases involving the imposition of remedial sanctions designed only to insure future voluntary compliance, for in such cases the statutory prescription of a range of remedial sanctions (such as suspension) itself satisfies any requirement of a rational rela-

This principle is particularly appropriate in reviewing administrative orders imposing sanctions for violations of statutory and regulatory requirements. The determination of what sanction is necessary to deter future violations, by both the violator and others, must be based upon an informed judgment that can properly be made only by the expert body which is thoroughly familiar with conditions in the industry and the significance of the violations found. "[T]he due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141) requires that the courts respect the agency's judgment concerning the sanction that is appropriate in the particular case.

With the exception of the court below in this case, the courts of appeals consistently have followed this principle in sustaining sanctions imposed by the Secretary of Agriculture. In *G. H. Miller & Co.* v. *United States*, 260 F. 2d 286, certiorari denied, 359 U.S. 907, the Seventh Circuit, in an *en banc* decision (overruling a decision by a panel) sustained the rev-

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tion between sanction and violation. Thus, in dealing with such remedial sanctions, the courts have applied a narrow scope of review, asking only whether the administrative order was authorized by statute and was neither arbitrary, capricious, nor an abuse of discretion. Cf. *In the Matter of Barsky* v. *Board of Regents*, 305 N.Y. 89, 111 N.E. 2d 222, affirmed, 347 U.S. 442. In any event, the Secretary's order here would satisfy any such "rational basis" test (see *infra*, pp. 14–16).

ocation by the Secretary of Agriculture of the registration of a "futures Commission merchant" under the Commodity Exchange Act. The court stated (260 F. 2d at 296):

> It is, therefore, clear to us that if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made *an allowable judgment in its choice of the remedy* and ordinarily the Court of Appeals has no right to change the penalty because the agency might have imposed a different penalty. [Emphasis in original.]

Similarly, in *Eastern Produce Co.* v. *Benson,* 278 F. 2d 606, the Third Circuit sustained an order of the Secretary of Agriculture suspending the licenses of registrants under the Perishable Agricultural Commodities Act, stating (at 610):

> The Judicial Officer considered all mitigating circumstances in arriving at his decision. Since his order is well within the allowable choice of remedy, we have no right to change the penalty because the agency might have imposed a different one.

And in *Hyatt* v. *United States,* 276 F. 2d 308, the Tenth Circuit, when confronted with a claim virtually identical to that made by respondent in the court below, concluded (at 313):

> The suspension of petitioners' registration [under the Packers and Stockyards Act] * * * was for twenty days. In view of their prior violations, the nature of the instant infractions,

and the other circumstances of the case, this penalty does not appear immoderate, and certainly it is one authorized by the act. It is not within our province on the record before us to interfere with the administrative determination.

B. THE SECRETARY DID NOT EXCEED HIS AUTHORITY IN SUSPENDING RESPONDENT'S REGISTRATION FOR 20 DAYS

1. The 20-day suspension was authorized by the Act

Under 7 U.S.C. 204, the Secretary has authority to suspend, "for a reasonable specified period," any registrant who has violated any provisions of the Act. The Secretary, after a hearing, the submission of briefs, and oral argument, determined that on February 25, 1969, respondent had violated the Act by underweighing livestock consigned to it for sale, and the court below properly upheld this determination as supported by substantial evidence. The Secretary acted within his statutory authority in suspending respondent's registration for 20 days.

Although the court of appeals acknowledged that the Secretary so acted, its opinion seems to suggest that the Secretary lacks authority to suspend merely negligent violators. It is by no means clear that respondent's violations were merely negligent.* But, in

*The hearing examiner found that respondent had intentionally underweighed livestock (see *supra*, p. 4), but the Judicial Officer merely determined "as did the hearing examiner, that respondent wilfully violated" the Act (Pet. App. B, 33). Thus the administrative findings pertaining to respondent's volitional state are ambiguous, for "wilfully" could refer to either intentional conduct or conduct which was merely in "careless disregard of the statutory requirements" (Pet. App. A, 25).

any event, the Secretary has ample authority to suspend registrants who commit violations in careless disregard of their statutory responsibilities.

Market agencies are treated by the Act as public utilities, as enterprises so directly affecting the public health and welfare as to warrant close public scrutiny and control. See *Denver Union Stock Yard Co.* v. *Producers Livestock Marketing Association*, 356 U.S. 282; *McCleneghan* v. *Union Stock Yards Co. of Omaha*, 298 F. 2d 659 (C.A. 8). For a market agency, like respondent, repeatedly and after several warnings to underweigh cattle consigned to it for sale (see *supra*, p. 3) constitutes a serious breach of the public trust, whether such action is intentional or merely negligent. The public is injured no less by the latter than by the former. Consequently, as the court below recognized (Pet. App. A, 23), violations may be committed by acting in careless disregard of the statutory requirements. See, *e.g.*, *Goodman* v. *Benson*, 286 F. 2d 896, 900 (C.A. 7).

Moreover, repeated negligent violations must be deterred to achieve fully the statutory "purpose of eliminating evils * * * in marketing livestock in the public stockyards of the nation * * * and to eliminate unfair * * * practices in the meat industry." *De Vries* v. *Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn.), affirmed, 199 F. 2d 677 (C.A. 8), certiorari denied, 344 U.S. 934. A cease-and-desist order, although inducing a greater degree of conscious compliance by the market agency to whom it is directed, may not secure future compliance by that market agency and has little effect in encouraging other market agencies to adhere to higher standards. But ne-

glectfulness by "great national public utilities" (*Stafford* v. *Wallace*, 258 U.S. 495, 516) toward their clear statutory responsibilities must be remedied. The Secretary has therefore determined, in this case as in others (see *infra*, pp. 20-21), that suspensions are necessary to deter repeated negligent violations of the Act. Congress recognized the need for such deterrence by granting the Secretary a broad suspension power, 7 U.S.C. 204, which makes no distinction between intentional and negligent violations of the Act.

Furthermore, as the court below observed, the issuance of the suspension in this case not only was authorized by the Act but fully complied with the Administrative Procedure Act, 5 U.S.C. 558, which authorizes suspension both in cases of "wilfulness" and where the registrant has received notice of prior violations and been given an opportunity to achieve compliance. Here respondent had been previously notified of three prior occasions of underweighing and had been accorded ample time to correct its performance. In light of this history of continuous violations, the issuance of a 20-day suspension, which will affect at most three business days, was a reasonable and proper exercise of the Secretary's discretion under the Act.

2. The grounds upon which the court of appeals set aside the suspension did not justify its action

a. The court improperly attempted to insure that the sanctions imposed by the Secretary were uniform in all cases

(1) Pointing to the fact that, in four other cases, the Secretary had ordered suspensions for the "domi-

nant purpose" of punishing registrants for violations characterized as "intentional and flagrant," the court below held that a suspension of respondent (whose violations, the court concluded, were "wilful" but not deliberate or flagrant) would not achieve uniformity of sanctions for similar violations. But the Secretary is not required to apply the same sanction in every case. A sanction that is within his authority is not invalid because it is allegedly more severe than those imposed in other cases. For example, the Secretary might determine that past leniency had hampered efforts to achieve full compliance with the Act and that as a consequence stricter measures were necessary to deter violations.

In *Federal Communications Commission* v. *WOKO*, 329 U.S. 223, in sustaining the Federal Communications Commission's refusal to renew a radio broadcasting license, this Court held (at 227–228):

> Respondent complains that the present case constitutes a departure from the course which the Commission has taken in dealing with misstatements and applications in other cases. * * * The mild measures to others and the appparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

In *Federal Trade Commission* v. *Universal-Rundle Corp., supra,* where a litigant sought to stay a cease-

and-desist order against certain unfair practices until similar orders were entered against competitors who allegedly had committed the same practices, the Court, emphasizing that "review must be limited to determining whether the Commission's evaluation of the merit of the petition for a stay was patently arbitrary and capricious" (387 U.S. at 250), upheld the denial of the stay on the ground that " 'the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress * * *' " (*id.* at 251).

The courts of appeals have also refused to compel uniformity of administrative sanctions. In *G. H. Miller* v. *United States, supra,* where the Secretary had revoked a license, the Seventh Circuit summarily rejected an argument based upon asserted non-uniform application of sanctions. The Second Circuit has also emphatically rejected the suggestion that it should oversee the uniformity of administrative sanctions (*Hiller* v. *Securities and Exchange Commission,* 429 F. 2d 856, 858–859):

> * * * Comparison of sanctions in other cases is foreclosed, however, by our decision in Dlugash v. Securities and Exchange Commission, 373 F. 2d 107 (2nd Cir. 1967). There petitioners complained that other parties in the same proceeding suffered disproportionately less severe penalties. We concluded that, even if the penalties were disproportionate, "it is irrelevant because the sanctions imposed upon the petitioners were well within the Commission's discretion." *A fortiori,* we cannot disturb the sanctions ordered in one case because they

were different from those imposed in an entirely different proceeding. "[F]ailing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with the regulatory powers of the Commission. * * *" Tager v. Securities and Exchange Comm'n, 344 F. 2d 5, 8–9 (2d Cir. 1965).

See also, *Kent* v. *Hardin*, 425 F. 2d 1346, 1349 (C.A. 5), rejecting as "unsound" the "argument that persons who have done much worse things received lighter penalties."

(2) Furthermore, the issue of uniformity of sanctions upon which the court below relied is an artificial one under the Act. Suspensions of registrants are designed to obtain compliance with the Act and not primarily to punish violators.[8] In this context, the

[8] Thus in *Eastern Produce Co.* v. *Benson*, *supra*, it was aptly observed that (278 F. 2d at 610):

"Petitioners' extended argument to the effect that this license suspension is purely punitive, not remedial, and thus cannot be justified is simply not persuasive. The order involves only a civil, administrative remedy. The issue was put to rest in Helvering v. Mitchell, 1938, 303 U.S. 391, * * * where Justice Brandeis indicated that 'Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted.' We concur with the expressed opinions of the First and Seventh Circuits that 'suspension of a registrant is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act.' Nichols & Co. v. Secretary of Agriculture, 1 Cir., 1942, 131 F. 2d 651, 659 modified in another particular on rehearing 1 Cir., 1943, 136 F. 2d 503; Daniels v. United States, 7 Cir., 242 F. 2d 39, 42, certiorari denied 1957, 354 U.S. 939 * * *."

distinction the court drew between "wilful" and "intentional and flagrant" violations has little relation to the legitimate enforcement objectives of the Secretary. Proper enforcement requires that negligent as well as intentional violations be prevented.

(3) In any event, the Secretary has not limited his imposition of suspensions to intentional and flagrant violations.[6] There are many cases in which the Secretary has suspended registration for short-weighing producer's livestock even though the offense was not shown to have been deliberate or flagrant.[7] It has long been the practice of the Secretary to impose an appropriate suspension whenever there has been either notice and opportunity to comply with the law, or conduct that can properly be deemed "wilful" under 5 U.S.C. 558. Accordingly, respondent's suspension was consistent with the past administrative practice and did achieve substantial "uniformity of sanctions for similar violations" (Pet. App. A, 25).

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[6] In reaching the opposite conclusion, the court below relied primarily on *In re Milton Silver*, 21 A.D. 1438. But in that case the Secretary stated that "[f]alse and incorrect weighing of livestock by registrants under the act is a flagrant and serious violation thereof * * *" and that "even if respondent did not give instructions for the false weighings, his negligence in allowing the false weighings over an extended period brings such situation within the reach of the cited cases [sustaining sanctions] and we would still order the sanctions below" (21 A.D. at 1452). Thus, a "flagrant" violation in agency practice means no more than one which frustrates a key protection afforded by the Act.

[7] See, *e.g.*, *In re Art Martella*, 30 A.D. 1479; *In re Mary H. Meggs*, 30 A.D. 1314; *In re Producers Livestock Marketing Assn.*, 30 A.D. 796; *In re R. J. Trimble*, 29 A.D. 936; *In re Delbert Anson*, 28 A.D. 1127; *In re John A. Seymour*, 28 A.D. 1023; *In*

b. The court improperly substituted its judgment for that of the Secretary in concluding that a lesser sanction would be appropriate and reasonable

The court below also justified setting aside the suspension on the ground that the "cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate" (Pet. App. A, 25). But, as already shown (see *supra*, pp. 10–14), the fashioning of an "appropriate and reasonable" remedy is the function of the Secretary, not of the court. The court's role is only to determine whether the sanction the Secretary selected is within his authority. The independent determination by the court of the nature and degree of the sanctions necessary for proper enforcement of the Act constituted a "forbidden judicial

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re Carl Register, 28 A.D. 1021; *In re Tony G. Brasil*, 28 A.D. 869; *In re Williamstown Stockyards, Inc.*, 27 A.D. 252; *In re Gerry Kaus*, 26 A.D. 1265; *In re Tom Murray*, 26 A.D. 726; *In re Clark Tilghman, et al.*, 26 A.D. 62; *In re Smith Waller*, 25 A.D. 46; *In re Gordon Barber, et al.*, 24 A.D. 283; *In re Lemuel J. Wilson, et al.*, 23 A.D. 1492; *In re Middle Georgia Livestock Sales Co.*, 23 A.D. 1361; *In re Lyon B. Hutcherson, Jr.*, 23 A.D. 1349; *In re J. W. Edwards*, 23 A.D. 794. These cases all involve suspensions under the Packers and Stockyards Act because the registrant falsely weighed producer's livestock, and in none did the Secretary find that the offender acted deliberately or flagrantly. There are, additionally, numerous cases under the Act where registrations were suspended because of diverse other violations without a holding that the conduct was intentional or flagrant. See, *e.g.*, *In re Dub Wallis*, 29 A.D. 37. Moreover, there are numerous instances of suspensions, not predicated on a conclusion that the violations were deliberate or flagrant, under other remedial statutes administered by the Department.

intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, 670.

In any event, there was no showing that the publicity here was other than the routine publicity which attends all cases of this kind.[4] Such publicity, which furthers the public's interest in being informed of administrative action taken on its behalf, is not a substitute for the sanction that is necessary to effective implementation of the statute. Cf. *Bowman* v. *United States Dept. of Agriculture*, 363 F. 2d 81, 86 (C.A. 5); *Federal Trade Commission* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308 (C.A.D.C.).

C. PERMITTING JUDICIAL MODIFICATION OF THE ADMINISTRATIVE SANCTION WOULD MAKE IT MORE DIFFICULT TO OBTAIN COMPLIANCE WITH THE ACT

The practical effect of the action of the court of appeals will be to make it more difficult for the Secretary to obtain compliance with the Act. The effectiveness of the threat of sanctions such as suspension as a deterrent to violations of the Act is bound to be weakened if registrants know that such sanctions are subject to judicial modification or elimination if they can persuade the court that their illegal conduct was not as serious as the Secretary concluded.

The consequence is especially significant when the violation involved is false weighing—respondent's violation—because such activity has resulted in substantial losses to producers and the Packers and Stock-

[4] The court was apparently referring principally to the Secretary's press releases issued in connection with this matter. See Br. in Opp. App. D and F.

yards Administration has been able to carry out only a small number of selective weighing investigations each year.[9] In view of these enforcement problems, the ability of the Secretary to impose meaningful sanctions must be maintained.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals setting aside respondent's suspension should be reversed and the 20-day suspension ordered by the Secretary should be reinstated.

Respectfully submitted.

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DECEMBER 1972.

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[9] The necessity for an effective deterrent against this type of violation is shown by a report of the Department of Agriculture to Congress in 1969 which indicated that false weighing alone results in losses to livestock producers of approximately $15 million annually. Congress was further told that false weighing had been found at 19.4 percent of the markets and buying stations investigated in 1968, including 14.4 percent of the facilities examined on a "routine, spot check basis without any reason to suspect false weighing." Hearings before a Subcommittee of the House Committee on Appropriations, "Department of Agriculture Appropriations For 1970," Part 3, 91st Cong., 1st Sess., p. 19.

APPENDIX

The Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181 *et seq.*, provides in pertinent part:

7 U.S.C. 204:

> On and after July 12, 1943, the Secretary may require reasonable bonds from every market agency and dealer, under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction.

7 U.S.C. 208(a):

> It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

7 U.S.C. 213(a):

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determin-

ing whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock.

7 U.S.C. 221:

> Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

The provisions of the Judicial Code governing judicial review of this case in the court of appeals, 28 U.S.C. 2341 *et seq.*, provide in pertinent part:

28 U.S.C. 2342:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

* * * * *

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

* * * * *

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. 2349(a):

The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

U.S. GOVERNMENT PRINTING OFFICE: 1972

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Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1545

EARL L. BUTZ, SECRETARY of AGRICULTURE,
And The UNITED STATES OF AMERICA
PETITIONERS

v.

GLOVER LIVESTOCK COMMISSION,
COMPANY, INC.
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

RESPONDENT'S CORRECTED STATEMENT

The statement given on behalf of the Secretary will be accepted by the respondent, with the exception of the last three paragraphs thereof. In those paragraphs, the petitioner departs from facts and presents an argument, or rather attempts to invade the minds

of the learned judges below, as to the reason for their holding. The respondent feels that the only fair way to present to this court the lower court's view is a verbatim recital of the language employed, rather than to paraphrase the language or to quote from it in an order different than appears in the opinion itself. The language used by the court of appeals is as follows:

> "The Department refers us to four decisions of the Secretary in which suspensions of registration are imposed for short-weighing consigned cattle. In re *Townsend*, 27 A.D. 68 (1968); In re *Farmers Commission Co. Inc.*, 24 A.D. 1491 (1965); In re *Wayne County Livestock Exchange, Inc.*, 23 A.D. 185 (1964) and In re *Milton Silver*, 21 A.D. 1438 (1962). In all four it was clearly established that the complained of conduct was intentional—in each the respondent had deliberately 'back-balanced' or set the scale back behind zero so that it would shortweigh livestock. And it is apparent that the dominant purpose of the suspensions imposed was to punish the various respondents for their intentional and flagrant conduct.
>
> Here to say the least, the evidence indicates that Glover acted with careless disregard of the statutory requirements and thus meets the test of 'wilfulness,' but its conduct was not shown to be deliberate or flagrant. Although we fully appreciate the seriousness of the offenses committed by Glover, a suspension would not 'achieve * * * uniformity of sanctions for similar violations' (see in re *Milton Silver*, supra, at 1452) and it

appears to us to be 'unwarranted and without justification in fact.' *American Power & Light Co.*, supra, at 112-113. The cease-and-desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate. Under these circumstances a suspension would be unconscionable. We reverse as to the suspension of Glover as a registrant under the Act.

The Secretary's order is affirmed as modified." (Pet. App. A, 24-25)

SUMMARY OF ARGUMENT

While the respondent has never abandoned, except for the record, the constitutionality of a proceeding whereby its right to a judicial hearing on the merits is denied, it concedes, as it has conceded, that any statutorily authorized order of the Secretary is subject only to a limited scope of judicial review. The scope of that review has been considered by this court and the circuit courts on many occasions, and out of those cases have come many scholarly definitions of the rights enjoyed by the respondent and others similarly situated to seek relief from an administrative order.

After this matter ended its long tortuous journey through the maze of administrative procedure, the respondent appealed, and in the briefs prepared and filed here and in the circuit court, many cases have been cited as to the scope of judicial review involved herein and in many instances, the same cases have been cited by both sides. Whatever the particular language used

by this court or the circuit courts, no court has ever felt itself powerless to look over the shoulder of the executive branch of our federal government to ascertain whether or not such an agency had violated the constitutional or statutory rights of a citizen of this nation. This court stated in *American Power Co. v. Securities and Exchange Commission*, 329 U. S. 90 not only that "the relation of remedy to policy is peculiarly a matter for administrative competence * * *" as is quoted by the petitioners at Page 7 in their summary of argument, but also that the remedy chosen will not stand if it is "unwarranted in law or is without justification in fact." The petitioners and the respondent's citations from that case are taken from Pages 112-113.

The government seeks a reversal of the Eighth Circuit's modification of the sanction invoked for the following reasons:

(1) The Act authorizes suspension by the Secretary for violations thereof.

(2) The Secretary had previously ascertained that suspensions were necessary where the violations were merely negligent, as opposed to intentional, deliberate, and/or flagrant.

(3) Even if the Secretary had established a standard of conduct that was decisive on the question of invoking a suspension or not, a reviewing court had no authority to even consider the established standard in ascertaining whether or not a suspension should be invoked in a particular case.

As to the first point, respondent readily concedes that a suspension is authorized by the Act.

On the contrary, however, the respondent has consistently maintained that the Department of Agriculture decided many years ago that suspensions were only necessary where the weight violations were deliberate and intentional, as opposed to merely accidental or negligent. This is supported by the fact that the Secretary never ordered a suspension before or after the one in issue, unless the weighing violation was found to have been conducted deliberately and/or intentionally by some overt act of the market agency, usually back-balancing the scales.

As to the third point, having established the standard by which suspensions are invoked or not, the Secretary should not be allowed to arbitrarily and discriminatorily administer the Act by suspending the Glover Livestock Commission Company, Inc., where even its own departmental investigators, attorneys, and judges found no intentional, deliberate, or flagrant violations by the respondent as to its weighing activities. In all cases decided before and after the one in issue, no suspension had been ordered for accidental or negligent weight violations, nor did the Secretary give any reason in this case that a suspension was necessary, as to the specific market agency involved, or that it would be necessary, as to future violations of a similar nature by others, to insure compliance with the Act.

The court appeals below, while recognizing the limited scope of judicial review to which the respondent was entitled, and while affirming the Secretary on

its fact finding that there had been a weighing violation, found that the Secretary had established a standard of conduct to be used in ascertaining whether or not a suspension should be ordered and modified so much of the order in this particular case as included a suspension finding that such, under the circumstances herein involved, would be "unconscionable".

The ruling of the lower court below poses no threat to the proper administration of the Act in question or the administration of any other regulatory agency, since it requires those agencies only to administer their congressionally mandated authority in a fair and nondiscriminatory manner.

ARGUMENT

THE COURT OF APPEALS WAS CONSTITUTIONALLY AND STATUTORILY AUTHORIZED TO MODIFY THE SECRETARY'S ORDER BY SETTING ASIDE THE SUSPENSION INVOKED AGAINST THE RESPONDENT.

A. THE CONSTITUTIONAL REQUIREMENTS OF CHECKS AND BALANCES, AS BETWEEN BRANCHES OF GOVERNMENT, NOT ONLY AUTHORIZE BUT DEMAND THAT A REVIEWING COURT SET ASIDE ANY ADMINISTRATIVE ORDER FOUND BY THAT COURT TO BE "UNCONSCIONABLE".

The petitioners argue that the court below exceeded its power of judicial review as to the suspension order because the review of such an order is limited to determining whether the agency made an *allowable* choice of remedy. — Once again, the same line

of cases are cited, all of which contain varying definitions of the scope of proper judicial review of administrative sanctions, none of which, under any conceivable interpretation, allow a sanction to stand that was found to be "unconscionable".

There are no reported cases where this court has considered such an insignificant matter as a twenty-day suspension of a livestock market agency, which suspension, according to a magnanimous United States Department of Agriculture, would involve only three sale days. All other persons, firms or corporations who have pled their cause before this final tribunal, as to an order of an agency of the United States government, have come here on matters of great financial import. The respondent here is neither a public utility, a national radio or television broadcasting system nor does it engage in multimillion dollar commodity futures transactions. It is here simply because it received partial vindication of its integrity by the ruling of the Eighth Circuit Court of Appeals. Its stockholders and employees denied, and deny to this day, any wrongdoing.

On May 12, 1969, a complaint was filed against it by the Secretary of Agriculture (App. 2, 3), and on May 20, 1969, an attorney for the Secretary posted a letter advising the petitioners that execution of a document attached to that letter would result in a recommendation by the Office of the General Counsel of the United States Department of Agriculture to the Judicial Officer of the Department of Agriculture that a final order be issued as outlined in said document. The petitioners were given a chance to follow what is

known of and referred to in that letter as a "Consent Order Procedure". (Res. App. B, C)

The "Consent Order Procedure" would have resulted in a final order on behalf of the Secretary identical with the one from which the petitioners sought judicial review of the Eighth Circuit Court of Appeals, except that the period of suspension had been reduced by the Judicial Officer of the United States Department of Agriculture from the thirty days recommended by the Hearing Examiner to twenty days.

It is respectfully submitted that neither the constitution nor any applicable statute require approval of administrative actions simply because the agency involved was statutorily empowered to take such action. The court below did not deny the Secretary's authority to suspend the petitioners for twenty days. It merely held that such action would be "unconscionable." This ruling represents no danger to the power of the Secretary of Agriculture; it merely imposes upon him a duty to act in good conscience. Is this a burden on an agency of the United States of America?

Likewise, is a reviewing court and a federal judiciary system powerless to set aside a penalty of an agency over which it has statutory authority to supervise, if it finds that such action is "unreasonable; * * * and not guided or influenced by conscience, unscrupulous." (Webster's UnAbridged Dictionary)

Three cases are cited by the Secretary to sustain his position that the court below is the only court of appeals that has failed to follow the established principals of judicial review in similar situations. In other words, it would put the Eighth Circuit in con-

flict with all other circuits and with this court as to the question in issue. This is clearly an erroneous position, as is evident by a simple reading of the opinion written by Circuit Judge Stephenson in this matter. If the Secretary had given a reason why the sanction was necessary to deter future violations, then he would have been affirmed in all respects. He gave no reason to the court below, and he gives no reason here today. He would hide behind the *expertise* theory that only the Department can determine what sanction is necessary to deter future violations, and that he is the only person who has the informed judgment to make such a decision. The Secretary never found it necessary before to suspend a market agency under the factual situation involved here (as will be hereinafter discussed in greater detail), so there was no basis for his action upon which the court below could justify such action. He came before them with a suspension order that had never been invoked before under the same or similar factual situations and one that was found by the court below to be "unconscionable." What standing does he have to complain because the Eighth Circuit did its duty and reversed the suspension?

The three cases cited by the Petitioners are *G. H. Miller & Co. v. United States*, 260 F.2nd 286, certiorari denied, 359 U. S. 907; *Eastern Produce Co. v. Benson*, 278 F.2nd 606; and *Hyatt v. United States*, 276 F. 2nd 308. Except for the fact that all three cases cite the concededly limited scope of judicial review of administrative actions, they are not in point to the question here. In *Miller*, supra, there was no defense offered to the proof tendered by the Secretary of Agriculture, and there was positive testimony that the

petitioners had cornered the egg market to their profit of some $162,000.00 and how they went about doing it. It is noteworthy also that there was not only a rather scathing disent, but the opinion of the majority reflected that "ordinarily" a court of appeals has no right to change a penalty. The qualification is built into the opinion itself as quoted by the petitioners here at Page 13 of their brief. In *Eastern Produce*, supra, the parties, seeking a review of the Secretary's suspension orders, admitted violations of the Commodities Act, and in *Hyatt*, supra, the suspended registrants had previously admitted violations of the same Act in question by utilization of the "Consent Order Procedure" the year preceding the alleged violation in question.

In none of those cases was a finding that the sanction invoked was "unconscionable" or that the Secretary had deviated from his prior practices as to the same or similar violations. The respondent finds no fault with the rulings in those cases, but they are not persuasive here because of the factual differences just pointed out. It should be noted also that the Tenth Circuit in *Hyatt v. United States*, supra made a specific finding that the penalty "does not appear immoderate." The court took note of the prior violations and the nature of the proven infractions. It would appear that the Tenth Circuit would be in accord with the Eighth Circuit as to the Secretary's actions against the respondent, Glover Livestock Commission Company, Inc., and that the sanction must be "conscionable" (Eighth Circuit) "not immoderate" (Tenth Circuit)

B. THE NAKED AUTHORITY ENJOYED BY THE SECRETARY DOES NOT EXTEND TO EXERCISING THAT AUTHORITY ARBITRARILY NOR WITHOUT RESTRAINT.

1. An administrative order, which is unwarranted because of the lack of factual basis, cannot be justified merely because of the conclusionary language used by that agency in its order.

The petitioners would ask this court to reverse simply because a suspension is authorized by the act in question.

In spite of the fact that the opinion specifically states the suspension was within the Secretary's statutory authority, the petitioners would imply that the Eighth Circuit acted because of a misconception of the applicable law, with the following language from Page 14:

> "Although the court of appeals acknowledged that the Secretary so acted, its opinion seems to suggest that the Secretary lacks authority to suspend merely negligent violaters * * *"

This position just simply cannot be maintained. There is nothing in the opinion to suggest that the learned judges below had any misconception as to the Secretary's authority nor the scope of its review, as set out by statute and defined by previous pronouncements of this court.

Then in a footnote, at Page 14, the petitioners would deny to the respondents their partial vindication by the circuit court upon the theory that there

was ambiguity between the Hearing Examiner's recommended order and the Judicial Officer's final order in the choice of language employed. For whatever reason the Hearing Examiner used the word "intentionally", it is certainly wholly immaterial. He probably used it out of habit, because he was recommending a suspension. However, the Judicial Officer did not find any intentional violation, nor is there one alleged in the complaint filed against Glover nor any facts upon which such a finding could have been based. All that was found and all that could have been found was that the employees of the U. S. Department of Agriculture, on February 25, 1969, weighed twenty-eight drafts of livestock that had previously been weighed by the respondent during its auction sale and found certain weight discrepancies. Of those reweighed, nine weighed more according to the government, ten weighed the same, and nine weighed less. Since livestock are expected to lose weight when denied excess to food and water, the government concluded that, on the day in question, the respondent had not weighed the cattle properly. Testimony was introduced that such reweighing tests had been previously performed by the employees of the United States Department of Agriculture, in all of which there was some variance, some weighed more, some weighed the same, and some weighed less, but there was no proof that the respondent back-balanced the scale so that the livestock would be short-weighed purposely or that it did anything of a deliberate or intentional nature to knowingly under-weigh livestock.[1]

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[1]Packers and Stockyards area Supervisor Kenneth Grizzell, who supervised the investigation, admitted he had no proof of intentional incorrect weighing by Glover. (App. 8)

Therefore, there is absolutely no merit to the position taken by the government, at Page 14, that the Secretary found that the respondent's violations were anything more than negligent and certainly not that there was any sort of a finding of a deliberate, flagrant or intentional violation of the Act.

The petitioner takes the position at the bottom of Page 15 that a cease-and-desist order may not secure future compliance by the market agency and has little effect in encouraging other market agencies to adhere to our standards. The Solicitor General and the Department of Justice may not so feel, but the Secretary of Agriculture certainly did, and after all, he is the one charged with administering the Act by his decisions in previous cases.

No suspension order was found necessary in the following three cases, where the violations were clearly deliberate and intentional. In *Clinton Cattle Co.*, 24 A.D. 7, the market agency received three warnings by the Department that the scales would not weigh accurately, but they continued the use of them until a complaint was filed against them and a cease-and-desist order was the only sanction. *Dale Oswald d/b/a Dale's Sales Barn*, 26 A.D. 1061 (1967) was a case wherein the agency's scales were rejected as being out of tolerance on November 30, 1966; a letter was posted to that effect December 15, 1966, and again on January 9, 1967 that the scales were not accurate and that the continued use thereof would be contrary to the Act and the regulations thereunder. The agency, however, continued to use the scales through May 3, 1967, and after a complaint was filed against him on June 8, 1967, he admitted all of these matters and admitted

that for over a year he had failed to maintain and operate his scales so as to insure accurate livestock weight. No suspension, just a cease-and-desist order. Finally, in *Clarendon Auction Sales, Inc.*, 27 A.D. 222 (1968), the agency operated scales that were admittedly inaccurate in that they greatly exceeded the allowed tolerances and continued this operation for some eight months after the Department had rejected the scales and advised them not to use the same until repaired and approved upon retesting by the Department. Further, the scale had no type registering weigh beam, no dial or mechanical ticket printer or other device to print weights on scale tickets. This corporation issued scale tickets that did not show the name of the weighing agency, the date of the weighing, the name of the buyer, the name of the seller, the number of head, the kind and actual weight of the livestock, nor the name or initial of the weighmaster. They admitted not only these violations but further that they had been notified some three years prior thereto as to scale ticket violations. As if this were not enough, this corporation for over three years after notification that such conduct was in violation of the regulations, failed to follow the Department's requirements for segregationg their funds from those due the seller in a separate bank account. — No suspension, just a cease-and-desist order.

In all these cases, the exact nature of the violation and how it might be corrected was made known to the market agency. Not so with this respondent. All that was alleged or proven against it was that the Department's own employees conducted a check-weighing procedure on certain occasions, and that the

Department's employees found the weights to be different from those found by the respondent's employees.

Not only had the Secretary previously determined that a cease-and-desist order was all that was necessary in the above styled cases, but he has consistently, systematically, and uniformally refused to invoke a suspension unless, as the Eighth Circuit pointed out, the conduct complained of was intentional, and further, in all cases cited by the Secretary in the court below, the market agency had deliberately "back-balanced" or set the scale back beyond zero so that it would short-weigh livestock. The statement made by the Department of Justice, at Page 16 of its brief, that the Secretary had made a determination prior to the final order in this case that suspensions were necessary to deter repeated "negligent" violations of the Act, and the cases cited for its position by references to Pages 20 and 21 of its brief are misleading to the extreme in that all eighteen of them involved an admission of guilt and were conducted under the so called "Consent Order Procedure". No negligent violations were involved in any of those cases; no hearing was held; and no adjudication necessary by the Secretary. Those parties were guilty, admitted their guilt, and plea-bargained with the Department of Agriculture.

These cases will be discussed in greater detail under the heading wherein they are cited by the government, but it is noteworthy in passing that three of those parties entered into a consent order, since Glover was administratively concluded by the Department, and all three involved not only admissions by the market agency but also either a finding that they

"knowingly" short-weighed by back-balancing prior to weighing, weighed when the scales were not in balance, or failed to install and maintain the scales so as to insure accurate weights. None of the suspensions exceeded twenty days in duration.

The Secretary of Agriculture had not made such determinations as are credited to him by the Department of Justice.

2. THE COURT OF APPEALS WAS STATUTORILY AND CONSTITUTIONALLY EMPOWERED TO MODIFY THE SECRETARY'S ORDER ON THE GROUNDS STATED IN ITS OPINION.

a. THE COURT BELOW MERELY RESTATED THE SECRETARY'S ESPOUSED DESIRABILITY OF UNIFORM SANCTIONS FOR SIMILAR VIOLATIONS AND USED THE PRECEDENT ESTABLISHED THEREBY AS ONE OF ITS REASONS FOR MODIFICATION OF THE ORDER IN ISSUE.

The petitioners argue as follows:

> "The court improperly attempted to insure that the sanctions imposed by the Secretary were uniform in all cases."

The Eighth Circuit made no attempt, properly or improperly, to do that which is alleged by the Department of Justice. It was the Secretary, not the Eighth Circuit, that found uniformity of sanctions to be desirable in an opinion written in 1962 and cited by the Secretary in In re *Roy C. Townsend d/b/a Madison Stockyards*, 27 A.D. 68 (1968). This is the usual

citation contained in final orders of the Secretary in a contested case where it is necessary for findings and conclusions to be made under the Act as to improper weighing allegations against a market agency. It is obvious that the case cited therein, In re *Milton Silver*, 21 A.D. 1438 (1962) has established the standard by which the Secretary and his precedessors, since 1962, decide the nature of the sanctions to be imposed. This standard has been scrupulously followed by the Secretary on the question of suspensions in all cases since it was first embraced by the Secretary, *except the one involving the respondent, Glover Livestock Commission Company, Inc.*

The Secretary came before the Eighth Circuit Court of Appeals citing four cases to sustain his position as to the suspension, all of which involved factual situations wherein it was clearly established that the conduct complained upon was deliberate in that the market agency in each case had purposely "back-balanced" or set the scale behind zero so that it would short-weigh livestock. This was his authority for the suspension against this Respondent, and the Secretary was silent as to Glover's repeated allegations of discriminatory action against it and cited no prior ruling of the Department invoking a suspension in the absence of deliberate short-weighing.

Respondent is not unmindful of Footnote 6 at Page 20 of the petitioner's brief, wherein they attempt to explain away In re *Milton Silver*. First they would state that the Hearing Examiner would have ordered a suspension if the short-weighing practice was negligent only and further would state that a "flagrant violation" means nothing more than a violation involv-

ing incorrect weighing practices. Neither position has any standing whatsoever, in that the negligence referred to, wholly in passing and as dictum, was based upon the testimony of Mr. Silver that if his weighmaster was false-weighing livestock, he knew nothing about it. This position was patently ridiculous, in that the weighmaster gave an affadavit that he back-balanced the scales on instructions from Mr. Silver, and the scales were back-balanced so often that the Hearing Examiner felt that Mr. Silver had to know of this practice, even if his weighmaster committed purgery when he advised the U.S.D.A. employees that he did so on instructions of Mr. Silver. In addition, the Department's employees, on at least two occasions, observed the weighmaster taking particular care to back-balance the scales before he began weighing. Further, the remarks of the weighmaster, as to the deliberate back-balancing, was fully corroborated by other evidence, and the record did not demonstrate any purpose or reason for the weighmaster so to weigh livestock absent instructions from his employer. It was, therefore, concluded that the weighmaster "intentionally" under-weighed livestock on instructions from the respondent. It is also worthy of noting in passing a specific finding by the Hearing Examiner at Page 1451 that the respondent "wilfully" and "intentionally" violated—that is weighing falsely and incorrectly, and by reason of the means employed to achieve such results, that is, by knowingly weighing calves when the livestock scale was not in balance. As to the second contention, the Hearing Examiner stated that "Respondent should be suspended as a registrant under the Act for a period of thirty days, which is less than that recommended by complainant,

to achieve some uniformity of sanctions for similar violations of the Act in other cases." (Citing numerous prior decisions) Then follows the misquoted language from the petitioner's footnote which should read "False and incorrect weighing of livestock by registrants under the Act is a flagrant and serious violation thereof."

The Hearing Examiner did not say that every weighing violation was a "flagrant" violation—that is what the Department of Justice is trying to say, ignoring the fact that the same Hearing Examiner cited *Silver*, as authority for invoking suspensions in the three other cases relied upon by the Secretary in the court below, all of which involved deliberate back-balancing.

Discrimination is practically admitted by the government's repeated insistence that cases exist contrary to the position taken by the respondent in the court below, when, in truth and fact, no such cases exist. Since the respondent first alleged arbitrary and discriminatory administration of the Act against it, the Secretary, and now the Department of Justice, have made repeated and pathetic attempts to furnish evidence that suspension orders have been issued against market agencies absent a deliberate, as opposed to an administratively found negligent, short-weighing of livestock. The silence of the Secretary in the briefs below, the failure to furnish an appropriate citation when specifically asked by the panel of judges during oral argument, the wholly immaterial compilation of the Department of Agriculture referred to in the footnote in the petition for certiorari is only compounded by the blatant mis-statement made

at Page 20 of the brief for the petitioners, to the effect that many suspension orders have been entered for short-weighing practices even though the offense was not shown to be deliberate or flagrant, and the cases cited in support thereof.

Eighteen cases are cited for the position that suspension orders had been entered by the Secretary for weight violations, even though that violation was not deliberate or flagrant. It was necessary for respondent's counsel to go to a great deal of time and effort to secure copies of these internal compilations of the United States Department of Agriculture, but such has been done and in all eighteen cases, *without exception*, the market agency involved followed the Department's "Consent Order Procedure" and, in effect, pled guilty. These cases are of no value as a precedent whatsoever. They represent merely sterotyped or identical language in the preliminary statement setting out the fact of an answer, the waiving of oral hearing, and the consent to the issuance of a *specified* order containing findings of fact and conclusions. The introductory paragraph further recites, *without exception*, that the Department has recommended that the order consented to by the respondent be issued. Thereafter follows various findings of fact, all of which conclude with an order that had previously been consented to by the market agency. Insofar as the question before the bar of this honorable court is concerned, these cases represent a sham defense on behalf of the Secretary of Agriculture and are evidence of nothing except that a complaint was filed and the market agency admitted its guilt, knowing in advance what sanctions would be imposed because of the violations alleged.

Even the headnote of each and everyone of these eighteen cases concludes with the same word * * * *consent.* The respondent here denied the allegations brought it by the United States Department of Agriculture and has been fighting to vindicate itself for over three and one-half years. It did not accept the Department's offer of a "Consent Order Procedure," does not admit it violated the Act, and insisted upon its full right of hearing and judicial review. A suspension was invoked as the result of a fact finding by the Department's own employees, which fact finding had for its only basis the Department's own testing procedures and the testimony of its own employees. There was no admission of guilt, and there was no proof of what, if anything, respondent actually did wrong.

A mere cursory examination of the nature of the violations in the eighteen cited cases reveal that the Secretary was magnanimous, indeed, as to some of the sanctions he invoked.

The Solicitor General concludes his footnote as to these cases with the following remark:

> "These cases all involve suspensions under the Packers and Stockyard's Act because the registrant falsely weighed producer's livestock, and in none did the Secretary find that the offender acted deliberately or flagrantly."

Would he lead this honorable court to believe that omitting required information from scale tickets and repeatedly preparing purchase invoices at a weight different from the weight shown on the scale ticket *was not deliberate?* (In re *John A. Seymour*, 28 A.D. 1023 (1969)) Is it not deliberate to refuse to de-

posit sale proceeds in the required "trustee account" on three proven and admitted occasions resulting in a shortage exceeding $50,000.00? (In re *Tony Brazil*, 28 A.D. 869 (1969)) Surely back-balancing the scales and allowing the weighmaster to be a purchaser of livestock he weighs is *deliberate* as well as *flagrant*. (In re *R. J. Trimble*, 29 A.D. 936 (1970)) When scales are found by the Department of Agriculture employees to be back-balanced ten pounds, does it require the use of the exact terms *deliberate* and *flagrant* to make such activities of that nature—See In re *Mary M. Meggs*, 30 A.D. 1314 (1971). Of what assistance to this court, on the issues raised here by the respondent, is the particular choice of adjectives used by the Hearing Examiner in his conclusions, particularly when they all begin with the phrase "by reason of the facts set forth and findings * * * respondents have wilfully violated Sections * * *"?

The Glover Livestock Commission Company, Inc. and, more importantly, this court is entitled to a fair response by or on behalf of the Secretary of Agriculture on this point. If the government is sincere in its position that the scope of review of does not extend to the choice of remedies, without qualifications, and in all cases, regardless of the nature of the violation, the severity of the sanction or the previously established standard by which the imposition of suspensions are to be decided, why does it not go ahead and admit that which has been plain to all who chose to see—that the suspension against the Glover Livestock Commission Company, Inc. was the only one ever ordered in the absence of deliberate and flagrant violations proven either by admission of the market agency involved or by irrefutable evidence of deliberate wrong-

doing? Why take up the time of this court by continuely asserting a fact which is just simply not true?

b. THE PETITIONERS WOULD LEAD THIS HONORABLE COURT TO BELIEVE THAT THE CIRCUIT COURT IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE SECRETARY ON THE QUESTION OF AN ALLOWABLE CHOICE OF REMEDIES.

In a partial quote from the Eighth Circuit's opinion, it is now stated that the court justified the modification on the grounds that "cease-and-desist coupled with damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate". It overlooked the fact that the court went ahead and found that a suspension would be, under the circumstances, "unconscionable".

The government would further limit the court's power to review a sanction in the following excerpt from Page 21 of the government's brief:

> "The court's role is only to determine whether the sanction the Secretary selected is within his authority."

If this be the law, why did the government try to read into the administrative adjudications here a finding of an intentional violation by Glover? Why did they continue to assert that the Secretary had previously made a determination that suspensions were necessary to deter negligent violations, and why did it cite eighteen cases in attempt to support a statement that was not true? If the court had no authority whatsoever, except to determine whether or not the agency acted

within the overall outline of its congressional authority, why was it necessary to cite any previous ruling of the Secretary on weight violation cases?

The quoted language from the government's brief may be what the Department of Justice is seeking on behalf of the Department of Agriculture and all other administrative agencies, but it would require judicial abdication by the courts as to their statutorily authorized supervision over administrative action to achieve that goal:

> "Unless we make the requirements for administrative actions strict and demanding, *expertise*, the strength of modern government can become a monster which rules with no practical limits on its discretion."
>
> "Congress did not proport to transfer its legislative power to the unbounded discretion of the regulatory body." *Burlington Truck Lines v. United States*, 371 U.S. 156, 167, (emphasis the court's)

The Department of Justice contends, and the respondents do not deny, that the public is entitled to be informed of administrative action, and surely the Secretary of Agriculture should be entitled to issue press releases. However, it should be obvious that a press release by the Secretary of Agriculture, the context of the which is that the government of the United States has made a finding that the Glover Livestock Commission Company, Inc. was dishonest in its weighing practices, is certainly more damaging than a twenty-day suspension. Under the "Consent Order Procedure", there is only one press release. If a

market agency fights to vindicate itself against what it considers an unwarranted accusation by the government, there is a press release issued after the Judical Officer issues his order and then one again when the market agency appeals to the circuit court. Further, after the Secretary's investigators, prosecutors, and judges have completed their work and a finding is made as to short-weighing, the press release indicates four violations, whereas there was only the one and the other three are wholly derivitive.

Any news release by the Secretary of Agriculture is going to be considered newsworthy by the press, and the power to gain such attention should not be used indiscriminately. In this light, did the Secretary or the Department of Justice issue such a release when the Eighth Circuit modified the suspension order and found it to be "unconscionable"? Was there a press release issued when the Department of Justice made its decision to seek certiorari?

The respondents have never questioned that the Secretary of Agriculture was granted tremendous powers by Congress, but submits that he should not exercise them without restraint and without fear of any judicial review. The danger of inflicting irreparable damage upon a citizen from even the slightest abuse of those tremendous powers was succinctly stated by the Eighth Cincuit Court of Appeals in *Arkansas Valley Industries v. Freeman*, 415 F. 2nd 718 (1969):

> "It is a serious matter to invest an agency of the government with the power to sit as a prosecutor as well as to sit in judgment on an accused."

C. DIFFICULTY IN ADMINISTERING THE ACT IN QUESTION, FOR WHATEVER REASON, DOES NOT SHIELD THE SECRETARY FROM JUDICIAL REVIEW OF HIS ACTIONS.

The Department of Justice concludes its brief with the following argument:

> "Permitting judicial modification of the administrative sanction would make it more difficult to obtain compliance with the Act."

If it were not so frightening, it would be facetious for the United States Department of Justice to state that judicial review should be denied a wronged citizen because granting of the same would make administration of the Act in question more difficult. Since when did the difficulties of a public servant in performing his assigned tasks become sufficient reason for denying access to the courts to ascertain whether or not he was performing his duties in a discriminatory or non-discriminatory manner.

Further, difficulties in enforcing the Act in question because of a reputedly inadequate appropriation from Congress surely does not form the basis for denying judicial review of that agency's action. The footnote appearing at Page 23 of the petitioner's brief is a paraphrase of certain testimony of an official of the United States Department of Agriculture before a House Sub-Committee on appropriations, and whether the appropriation then existent or now existing is adequate or inadequate would certainly appear to be wholly immaterial when this honorable court considers the constitutional rights of the Glover Live-

stock Commission Company, Inc. If the Department requires a larger appropriation from Congress, let it go back to Congress from whence it got its authority to act in these areas and not to the courts, whose duty it is to uphold the constitutional rights of those affected by the agency's actions.

The government talks about the *threat* of sanction, such as a suspension, as a determent to violations of the Act. What is morally right or proper or, more importantly, constitutional about a governmental administrative agency desiring to threaten a registrant with a suspension and yet desiring to be secure in the knowledge that it is immune from judicial modification or elimination of the sanction, if imposed? Judicial review might make it more difficult for the Secretary of Agriculture or the head of any other administrative agency to obtain compliance with the Act, but administrative inefficiency might do likewise.

Finally, it is not the United States Department of Agriculture or the other administrative agencies that need protection by this court * * * it is those like the Glover Livestock Commission Company, Inc. who need a federal registration to remain in business who need such protection. A reversal as to Glover's partial vindication below would not seem likely to invite deliberate, intentional, and flagrant violations of the provisions of any regulatory statute, but a reversal could very likely force otherwise innocent persons or organizations similarly situated to accept an agency's offer of a "Consent Order Procedure", simply because they had lost confidence that the courts would give them any relief, regardless of the merits of their position.

The ruling of the Eighth Circuit Court of Appeals in the case of Glover Livestock Commission Company, Inc. poses no great threat to the administration of the Act in issue by the Secretary. The opinion buttresses his strength and power to have his own employees investigate, prosecute and judge anyone who needs a registration under the Act. All the Eighth Circuit said was that the sanctions he imposes, through the activities of his investigators, prosecutors, and judges must not be "unconscionable". What possible objection could men of reason have to such a mild qualification on administrative authority?

CONCLUSION

For all the reasons set out herein, it is submitted that the judgment of the court of appeals should be affirmed and for the further and more compelling reason that a reversal would be tantamount to a denial of any judicial review of an administrative agency's actions under any circumstances.

Respectfully Submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BUTZ, SECRETARY OF AGRICULTURE, ET AL. *v.* GLOVER LIVESTOCK COMMISSION CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-1545. Argued February 27, 1973—Decided March 28, 1973

Respondent stockyard operator, who after a hearing had been found to have short-weighted livestock and underpaid consignors on the basis of the false weights, was ordered by a Judicial Officer acting for the Secretary of Agriculture to cease and desist and to keep correct records, and its registration under the Packers and Stockyards Act was suspended for 20 days. The Court of Appeals upheld all but the suspension, which it found inappropriate in view of the other sanctions, and contrary to the Secretary's practice except for "intentional and flagrant" violations. *Held:* In setting aside the suspension order, the Court of Appeals exceeded the scope of proper judicial review of administrative sanctions, since the Secretary had full authority to make the suspension order as a deterrent to violations whether intentional or negligent, and issuance of the order against respondent, who had ignored previous warnings against short-weighting, was not an abuse of administrative discretion. Pp. 4-7.

454 F. 2d 109, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which DOUGLAS, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 71-1545

Earl L. Butz, Secretary of Agriculture, et al., Petitioners, *v.* Glover Livestock Commission Company, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[March 28, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Judicial Officer of the Department of Agriculture, acting for the Secretary of Agriculture, found that respondent, a registrant under the Packers and Stockyards Act, 7 U. S. C. § 181 *et seq.*, wilfully violated §§ 307 (a) and 312 (a) of the Act, 7 U. S. C. §§ 208 (a) and 213 (a), by incorrect weighing of livestock, and also breached § 401, 7 U. S. C. § 221, by entries of false weights. An order was entered directing that respondent cease and desist from the violations and keep correct accounts, and also suspending respondent as a registrant under the Act for 20 days. Upon review of the decision and order, the Court of Appeals for the Eighth Circuit upheld, as supported by substantial evidence, the findings that respondent violated the Act by short-weighing cattle, and also sustained the cease-and-desist order and the order to keep correct accounts. The Court of Appeals, however, set aside the 20-day suspension. 454 F. 2d 109 (1972). We granted certiorari to consider whether, in doing so, the Court of Appeals exceeded the scope of proper judicial review of administrative sanctions. 409 U. S. 947 (1972). We conclude that the setting aside of

the suspension was an impermissible judicial intrusion into the administrative domain under the circumstances of this case, and reverse.

Respondent operates a stockyard in Pine Bluff, Arkansas. As a registered "market agency" under § 303 of the Act, 7 U. S. C. § 203, respondent is authorized to sell consigned livestock on commission, subject to the regulatory provisions of the Act and the Secretary's implementing regulations.[1] Investigations of respondent's operations in 1964, 1966, and 1967 uncovered instances of underweighing of consigned livestock. Respondent was informally warned to correct the situation, but when a 1969 investigation revealed more underweighing, the present proceeding was instituted by the Administrator of the Packers and Stockyards Administration.

Following a hearing and the submission of briefs, the Department of Agriculture hearing examiner found that respondent had "intentionally weighed the livestock at less than their true weights, issued scale tickets and accountings to the consignors on the basis of the false weights, and paid the consignors on the basis of the false weights."[2] The hearing examiner recommended, in addition to a cease-and-desist order and an order to keep correct records, a 30-day suspension of respondent's registration under the Act.

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[1] 7 U. S. C. §§ 201–217a. Specifically, registrants are prohibited from engaging in or using "any unfair, unjustly discriminatory, or deceptive practice or device in connection with . . . receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling . . . of livestock," 7 U. S. C. § 213 (a), and are required to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business . . . ." 7 U. S. C. § 221.

The Secretary's regulations may be found in 9 CFR pt. 201.

[2] App., at 35.

The matter was then referred to the Judicial Officer. After hearing oral argument, the Judicial Officer filed a decision and order accepting the hearing examiner's findings and adopting his recommendations of a cease-and-desist order and an order to keep correct records. The recommended suspension was also imposed but was reduced to 20 days. The Judicial Officer stated:

> "It is not a pleasant task to impose sanctions but in view of the previous warnings given respondent we conclude that we should not only issue a cease and desist order but also a suspension of respondent as a registrant under the act but for a lessor period than recommended by complainant and the hearing examiner." 30 A. D. 179, 186 (1971).

The Court of Appeals agreed that 7 U. S. C. § 204 authorized the Secretary to suspend "any registrant found in violation of the Act," that the suspension procedure here satisfied the relevant requirements of the Administrative Procedure Act, 5 U. S. C. § 558, and that "the evidence indicates that [respondent] acted with careless disregard of the statutory requirements and thus meets the test of 'wilfulness.'" 454 F. 2d, at 115. The court nevertheless concluded that the suspension order was "unconscionable" under the circumstances of this case. The court gave two reasons. The first, relying on four previous suspension decisions, was that the Secretary's practice was not to impose suspensions for negligent or careless violations but only for violations found to be "intentional and flagrant," and therefore that the suspension in respondent's case was contrary to a policy of "achiev[ing] . . . uniformity of sanctions for similar violations." The second reason given was that "[t]he cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem

appropriate and reasonable with respect to the practice the Department seeks to eliminate." *Ibid.*

The applicable standard of judicial review in such cases required review of the Secretary's order according to the "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power Co.* v. *SEC*, 329 U. S. 90, 112 (1946). Thus the Secretary's choice of sanction was not to be overturned unless the Court of Appeals might find it "unwarranted in law or . . . without justification in fact . . . ." *Id.*, at 112–113; *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 194 (1941); *Moog Industries, Inc.* v. *FTC*, 355 U. S. 411, 413–414 (1958); *FTC* v. *Universal-Rundle Corp.*, 387 U. S. 244, 250 (1967); 4 K. Davis, Administrative Law § 30.10, at 250–251 (1958). The Court of Appeals acknowledged this definition of the permissible scope of judicial review[3] but apparently regarded respondent's suspension as "unwarranted in law" or "without justification in fact." We cannot agree that the Secretary's action can be faulted in either respect on this record.

We read the Court of Appeals' opinion to suggest that the sanction was "unwarranted in law" because "uni-

[3] The Court of Appeals stated:

"Ordinarily it is not for the courts to modify ancillary features of agency orders which are supported by substantial evidence. The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters, and so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere. . . . [A]ppellate courts [may not] enter the more spacious domain of public policy which Congress has entrusted in the various regulatory agencies." 454 F. 2d, at 114.

formity of sanctions for similar violations" is somehow mandated by the Act. We search in vain for that requirement in the statute.[4] The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent. *Hyatt* v. *United States*, 276 F. 2d 308, 313 (CA10 1960); *G. H. Miller & Co.* v. *United States*, 260 F. 2d 296 (CA7 1958); *In re Milton Silver*, 21 A. D. 1438, 1452 (1962).[5] The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a

[4] The Court of Appeals cited a 1962 decision by the Secretary in which appears a reference to "uniformity of sanctions for similar violations." *In re Milton Silver*, 21 A. D. 1438 (1962). That reference is no support for the Court of Appeals' decision, however, for the Secretary said expressly in that decision:

"False and incorrect weighing of livestock by registrants under the act is a flagrant and serious violation thereof . . ." and "even if respondent did not give instructions for the false weighings, *his negligence in allowing the false weighings over an extended period brings such situation within the reach of the cited cases* [sustaining sanctions] *and we would still order the sanctions below.*" *Id.*, at 1452 (emphasis added).

[5] It is by no means clear that respondent's violations were merely negligent. The hearing examiner found that respondent had "intentionally" underweighed livestock, and the Judicial Officer stated: "We conclude then, as did the hearing examiner, that respondent *wilfully* violated . . . the act." (Emphasis added.) "Wilfully" could refer to either intentional conduct or conduct that was merely careless or negligent. It seems clear, however, that the Judicial Officer sustained the hearing examiner's finding that the violations were "intentional."

particular case because it is more severe than sanctions imposed in other cases. *FCC* v. *WOKO*, 329 U. S. 223, 227–228 (1946); *FTC* v. *Universal-Rundle Corp.*, *supra*, at 250, 251; *G. H. Miller & Co.* v. *United States*, *supra*, at 296; *Hiller* v. *SEC*, 429 F. 2d 856, 858–859 (CA2 1970); *Dlugash* v. *SEC*, 373 F. 2d 107, 110 (CA2 1967); *Kent* v. *Hardin*, 425 F. 2d 1346, 1349 (CA5 1970).

Moreover, the Court of Appeals may have been in error in acting on the premise that the Secretary's practice was to impose suspensions only in cases of "intentional and flagrant conduct."[6] The Secretary's practice, rather, apparently is to employ the sanction as in his judgment best serves to deter violations and achieve the objectives of that statute. Congress plainly intended in its broad grant to give the Secretary that breadth of discretion. Therefore mere unevenness in the application of the sanction does not render its application in a particular case "unwarranted in law."

Nor can we perceive any basis on this record for a conclusion that the suspension of respondent was so "without justification in fact" "as to constitute an abuse of [the Secretary's] discretion." *American Power Co.* v. *SEC*, *supra*, at 115; *Moog Industries, Inc.* v. *FTC*, *supra*, at 414; *Barsky* v. *Board of Regents*, 347 U. S. 442, 455 (1954). The Judicial Officer rested the suspension on his

[6] See, *e. g.*, *In re Art Martella*, 30 A. D. 1479 (1971); *In re Mary H. Meggs*, 30 A. D. 1314 (1971); *In re Producers Livestock Marketing Assn.*, 30 A. D. 796 (1971); *In re R. J. Trimble*, 29 A. D. 936 (1970); *In re Delbert Anson*, 28 A. D. 1127 (1969); *In re Williamstown Stockyards*, 27 A. D. 252 (1968); *In re Middle Georgia Livestock Sales Co.*, 23 A. D. 1361 (1964). These cases involve suspension of registrants under the Packers and Stockyards Act for false weighing of producers' livestock and in none was there a finding that the violation was intentional or flagrant. There are also many cases of suspension for diverse other violations without a finding that the conduct was intentional or flagrant. See, *e. g.*, *In re Dub Wallis*, 29 A. D. 37 (1970).

view of its necessity in light of respondent's disregard of previous warnings. The facts found concerning the previous warnings and respondent's disregard of these warnings were sustained by the Court of Appeals as based on ample evidence. In that circumstance, the overturning of the suspension authorized by the statute was an impermissible intrusion into the administrative domain.

Similarly, insofar as the Court of Appeals rested its action on its view that, in light of damaging publicity about the charges, the cease-and-desist order sufficiently redressed respondent's violations, the court clearly exceeded its function of judicial review. The fashioning of an appropriate and reasonable remedy is for the Secretary, not the court. The court may decide only whether, under the pertinent statute and relevant facts, the Secretary made "an allowable judgment in [his] choice of the remedy." *Jacob Siegel Co.* v. *FTC*, 327 U. S. 608, 612 (1946).

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71-1545

Earl L. Butz, Secretary of Agriculture, et al., Petitioners, v. Glover Livestock Commission Company, Inc.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[March 28, 1973]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the respondent. Why certiorari was granted is a mystery to me—particularly at a time when the Court is thought by many to be burdened by too heavy a caseload. See Rule 19, Rules of the Supreme Court of the United States (1970).

The Court of Appeals did nothing more than review a penalty imposed by the Secretary of Agriculture that was alleged by the respondent to be discriminatory and arbitrary. In approaching its task, the appellate court displayed an impeccable understanding of the permissible scope of review:

> "The scope of our review is limited to the correction of errors of law and to an examination of the sufficiency of the evidence supporting the factual conclusions. The findings and order of the Judicial Officer must be sustained if not contrary to law and if supported by substantial evidence. Also, this Court may not substitute its judgment for that of

the Judicial Officer's as to which of the various inferences may be drawn from the evidence." 454 F. 2d 110–111.

. . . . .

"Ordinarily it is not for the courts to modify ancillary features of agency orders which are supported by substantial evidence. The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters, and so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere." *Id.*, at 114.

Had the Court of Appeals used the talismanic language of the Administrative Procedure Act, and found the penalty to be either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. § 706 (2)(A), I have no doubt that certiorari would have been denied. But the Court of Appeals made the mistake of using the wrong words, saying that the penalty was "unconscionable," because it was "unwarranted and without justification in fact." [1]

Today the Court holds that the penalty was not "unwarranted in law," because it was within permissible statutory limits. But this ignores the valid principle of law that motivated the Court of Appeals—the principle that like cases are to be treated alike. As Professor Jaffe has put the matter:

"The scope of judicial review is ultimately conditioned and determined by the major proposition that the constitutional courts of this country are the

[1] The Court of Appeals borrowed this phrasing of the test from this Court's opinion in *American Power & Light Co.* v. *SEC*, 329 U. S. 90, at 112–113.

> acknowledged architects and guarantors of the integrity of the legal system. . . . An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law, the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law' and the ultimate guarantees associated with the 'Constitution.'" [2]

The reversal today of a wholly defensible Court of Appeals judgment accomplishes two unfortunate results. First, the Court moves administrative decisionmaking one step closer to unreviewability, an odd result at a time when serious concern is being expressed about the fairness of agency justice.[3] Second, the Court serves notice upon the federal judiciary to be wary indeed of venturing to correct administrative arbitrariness.

Because I think the Court of Appeals followed the correct principles of judicial review of administrative conduct, I would affirm its judgment.

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[2] L. Jaffe, Judicial Control of Administrative Action, 589–590 (1965).

[3] See generally Kenneth C. Davis, Discretionary Justice: A Preliminary Inquiry (1969), reviewed by J. Skelly Wright, Beyond Discretionary Justice, 81 Yale L. J. 575.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1545

EARL L. BUTZ, SECRETARY of AGRICULTURE,
And The UNITED STATES OF AMERICA
PETITIONERS

v.

GLOVER LIVESTOCK COMMISSION,
COMPANY, INC.
RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

The Respondent, Glover Livestock Commission Company, Inc., sincerely feels that its rights have been overlooked in the overall machinery of government and beseeches the majority in this cause to take one further look at the briefs on file and its opinion, as hereinafter discussed, from the Respondent's view-

point which is best stated in the words of an Athenian scholar who uttered them some seventeen hundred years ago:

"Strike, if you will, but hear me."

1. The penalty invoked against Glover was the most severe ever ordered by the United States Department of Agriculture against a market agency and is, in fact, the only suspension ever invoked against such an agency in the absence of a confession of guilt or a fact finding, after a full evidentiary proceeding, of a deliberate and flagrant violation of the Department's weighing procedures and the exact manner in which the prohibited acts or act were accomplished.

2. The Respondent stands on the position stated in the preceding paragraph, just as its counsel stood before the Secretary's Judicial Officer, the impanelled judges of the Eighth Circuit Court of Appeals, and this honorable Court and challenged the United States Department of Agriculture to cite one case wherein a suspension was invoked against a market agency where the Department had no evidence of a deliberate violation of its weighing practices. Those acting on behalf of the Secretary have cited no such case and have misled this Court and the court below by alleging the existence of such a case or cases and by citing meaningless internally generated compilations or cases having no value as a precedent to the point raised by the Respondent here today and for over three years past.

3. It would seem well settled in administrative law that departmental policy, once established, cannot be changed without valid reasons being given therefor. In the case of this Respondent, no reasons for an obvi-

ous change in departmental policy was given, and this Respondent has and is being treated as if it had no right to even raise that issue.

4. This Court, in the majority opinion, seemingly dismisses the Respondent's right to be heard on this point because the Act in question does not require "uniformity of sanctions" for similar violations. The Act does not so specifically state. However, if the statutory mandate empowers the Secretary of Agriculture to administer the Act in such a manner as to best achieve conformity with the Department's rules and regulations, why does not that same statute empower the Secretary to establish standards by which to gauge the type and extent of sanctions to be imposed? If such broad powers are given the Secretary to penalize and to make fact findings, why do not those same powers include the right to establish "uniformity of sanctions?"

5. If it be conceded that the Secretary has the power to establish "uniformity of sanctions" for the same or similar violations, which he most assuredly has done, then we most earnestly implore this Court to study more closely the Secretary's prior rulings and beseech it to find one single case where the Secretary has ordered a suspension for a weight violation in the absence of a confession or after a full hearing which revealed not only the deliberate and flagrant nature of the violation but also the exact manner in which the wrongdoing was accomplished.

6. Asserting once again that the Respondent, Glover Livestock Commission Company, Inc., denies to this date any weight violations, counsel for the Respondent feels constrained to suggest that the ma-

jority examine with great care its remarks as contained in the first full paragraph on Page 6 of the Slip Opinion and the footnote referred to therein. But for editorial changes and deletion of some of the citations, an almost identical footnote (n. 7) begins on Page 20 of the Secretary's brief, which footnote cites cases and expresses language purportedly to support a position similar to that appearing in the majority opinion about which reference was just made. The cases cited on behalf of the Secretary were fully and completely discredited by the Respondent at Page 20, 21, and 22 of its brief, and all such cases, including those again cited by this Court in the footnote in question, involved guilty pleas under the "Consent Order Procedure." No findings were made and none were necessary. All of these cases were studied in depth by Respondent's counsel and while most contained a paucity of factual material, some of them contained sufficient evidence to indicate, beyond doubt, that the sanctions invoked were most lenient considering the nature of the offense.

7. Counsel for the Respondent is fully mindful of the respect due, deserved and earned by this honorable Court but finds that its duty as an advocate requires that it disagree most violently with the remarks made by this Court in the footnote appearing at Page 6 of the Slip Opinion which, after citing a number of cases, was as follows:

> "These cases involve suspension of registrants under the Packers and Stockyards Act for false weighing of producers' livestock, *and in none was there a finding that the violation was intentional or flagrant.*" (emphasis ours)

Two of the cases cited by the majority were *In re: R. J. Trimble*, 29 A.D. 936 (1970) and *In re: Mary H. Meggs*, 30 A.D. 1314 (1971). The former involved back-balancing the scales and allowing the weighmaster to be a purchaser and in the latter back-balancing the scales ten pounds was found and noted by the Secretary's investigators. *Can these violations be classified, by any stretch of the imagination, as being anything but intentional or flagrant?* Stated somewhat differently, *can* the Secretary place a semantic label on one of his orders and, by that label alone, deny judicial examination of its contents?

8. It is respectfully submited that a careful review by the majority will reflect that:

> "A. The Secretary had previously established a practice of imposing sanctions only in cases of deliberate violations;
>
> B. That he was statutorily empowered to establish such a practice;
>
> C. That 'uniformity of sanctions for similar violations' had been adopted by the Department as the best method by which to achieve conformity with its rules and regulations, long before the complaint against the Respondent;
>
> D. That the Secretary neither made a fact finding nor stated any conclusion that the Respondent's alleged violations were deliberate;
>
> E. That the suspension here was the only one ever invoked by the Secretary where the alleged violation was not found to be deliberate."

A suspension against the Respondent, under these conditions, surely should not be allowed to stand

judicial review, no matter how limited in scope. It was found by the court below to be "unconscionable" because it was "unwarranted and without justification in fact." The Administrative Procedure Act allows the judiciary to modify or reverse when the penalty is found to be either "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law". Will this Court allow the Department of Agriculture or any other agency of this government to insulate itself from judicial review of any act, no matter how unjust or unlawful, merely because it chose the proper label to place on that act and yet reverse a carefully considered decision of a Court of Appeals merely because of the choice of words used in their written opinion?

Whether the Court's action be "judicial abdication" as suggested in the Respondent's brief, a step closer to "non-reviewability" as stated in the dissenting opinion here or "an unjustificable abdication of the responsibility of judicial review" referred to in an article cited generally in the dissenting opinion,[1] there must be a point beyond which governmental efficiency ceases to justify denial of judicial inquiry into the actual quality of agency justice, and the Respondent suggests that such point has been reached here.

Respectfully Submitted.

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[1]Beyond Discretionary Justice, 81 Yale Law Journal, 575 at p. 581